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SUPREME COURT, U.S.
FILED
APR 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OTTAVIO BUSSANICH and ANTONIA BUSSANICH,

Petitioners,

—v.—

UNITED STATES LINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

1. Was the New York Court of Appeals wrong in broadly holding below that the Joint Maritime Safety Code for the Port of New York does not "expand" the duty of care owed by a vessel owner to a longshoreman under 33 U.S.C. § 905(b), where that Code was enacted by a Joint Safety Committee of the New York Shipping Association and the International Longshoremen's Association pursuant to the terms of a labor agreement?

2. Did the holding of the New York Court of Appeals contravene this Court's ruling, in *Scindia Steam Nav. Co., Inc. v. De Los Santos*, 451 U.S. 156 (1981), to the effect that the duty of care under 33 U.S.C. § 905(b) may be varied by "contract provision" or "custom" (451 U.S. at 172, 176, 179, 180)?

3. Did the trial court commit reversible error in striking Part C, section 1, of that Code from evidence and in refusing to charge that the provisions of that section were some evidence of negligence, in this action for personal injuries to a longshoreman brought pursuant to 33 U.S.C. § 905(b), where that section required the vessel owner to "maintain in safe condition for use all . . . work spaces" and the longshoreman was injured by a wooden plank that fell from above into the work space?

4. Did the trial court commit reversible error in charging that the vessel owner has no duty to maintain safety in the work space after cargo operations have commenced, in light of this Court's holding in *Scindia*, *supra*, to the effect that the vessel owner remains responsible for hazards that emanate from areas "under the active control of the vessel" or which "existed from the outset" (451 U.S. at 167, 176), where there was evidence that the wooden plank fell from an old ammunition bulkhead that was no part of the cargo operation?

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

OPINIONS BELOW

The January 14, 1986 opinion of the New York Court of Appeals which affirmed the order of the New York Supreme Court, Appellate Division, is reported at 67 N.Y. 2d 1, 499 N.Y.S. 2d 30, 489 N.E. 2d 1042. It is reprinted in the Appendix hereto, at pp. 1a-12a. The decision and order of New York Supreme Court, dated March 30, 1983, which denied Petitioners' motion for a new trial, is not reported. It is reprinted in the Appendix at pp. 17a-22a.

JURISDICTION

The order and judgment of the New York Court of Appeals, affirming the denial of Petitioners' motion for a new trial, was entered on January 14, 1986. This action was brought pursuant to 33 U.S.C. § 905(b). Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

33 U.S.C. § 905(b)

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

Petitioner Ottavio Bussanich was a longshoreman who tried his case for personal injuries pursuant to 33 U.S.C. § 905(b) before Justice Andrew R. Tyler and a jury in the New York State Supreme Court for the County of New York in November of 1980. After a verdict for the Respondent shipowner, Petitioners moved for a new trial (2215-16).[1] Justice Tyler's decision denying the motion was not forthcoming until March 30, 1983 (17a-22a). After an affirmance without opinion by the Appellate Division of the New York Supreme Court, First Department (15a), a motion for permission to appeal to the New York Court of Appeals was granted by that Court in an order of September 19, 1985 (13a). On January 14, 1986, the Court of Appeals rendered an opinion which affirmed the order of the Appellate Division (1a-12a).[2] Petitioners seek review of the Court of Appeals decision.

The major question at issue here is the applicability of the Joint Maritime Safety Code for the Port of New York (hereinafter "the Code") in a longshoreman's action for injuries sustained while discharging a vessel in that Port. In its opinion below, the Court of Appeals ruled that the Code does *not* "expand" the duties of shipowners under the Longshoremens' and Harbor Workers' Compensation Act (33 U.S.C. §§ 901-950) (1a). Petitioners claim that this constitutes major error. It is Petitioners' contention that "expansion" of such duties by

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1 Numbers in parentheses with nothing more refer to pages in the Appendix filed with the New York State Court of Appeals. Numbers followed by "a" refer to pages in the Appendix reprinted in this Petition.

2 Although briefed separately, this case was argued jointly before the Court of Appeals with *Cruz v. American Export Lines, Inc., et. al.*, because the central issue in both cases was the applicability of the Joint Maritime Safety Code for the Port of New York. Thus, the caption of the Court of Appeals opinion also refers to the *Cruz* case (1a), but the Petition herein only seeks review with respect to *Bussanich*.

codifications of custom and practice (such as the Code) was specifically contemplated by this Court in *Scindia Steam Nav. Co. v. De Los Santos*, 451 U.S. 156, 176 (1981). The opinion of the Court of Appeals, if allowed to stand, will portend major changes in the way cargo operations are customarily conducted in the Port of New York, with a significantly adverse effect upon considerations of safety for longshoremen.

The Code was promulgated pursuant to a collective bargaining agreement (50, 96-98), and sets forth numerous duties of the shipowner during stevedoring operations (96, 23a-39a, 2224-52). The defendant's verdict was returned below after Justice Tyler refused to charge the jury respecting relevant Code provisions (1927-28), even though *both* parties had requested it (1914-15, 1925-31), and then struck the Code from evidence as an exhibit (1930-31), over vigorous objection (1931-32). Part C, § 1 of the Code, which had been admitted as Exhibit 3 (98), reads as follows.

> "The owner, master and officers of the vessel shall supply and *maintain in safe condition* for use *all ships gear*, equipment, tools and *work spaces* which are to be used in stevedoring operations." (31a). (emphasis added).

A. The Accident

Ottavio Bussanich was a 55 year old longshoreman on October 23, 1974, when he received serious head injuries aboard Respondent's vessel, the SS PIONEER CONTENDER. Mr. Bussanich is now permanently disabled. He has not worked since the day of his accident. He sustained his disabling injuries while discharging household goods from the lower hold of the CONTENDER in Bayonne, New Jersey.

The Petitioner's fellow longshoreman, Mr. Mircovich, provided most of the details respecting the accident. They were working in the no. 3 hatch (220) unloading boxes of household goods, and Mircovich recalled that the steel hull of the vessel was covered with "planks, wooden planks, horizontally and vertically put on the walls" with "ordinary nails" (223). This

was the remnants of the ammunition bulkhead left over from a prior trip to Vietnam. Mircovich saw a wooden timber fall from the ammunition bulkhead and hit Bussanich in the head (227-28). He testified that the timber which fell from the ammunition bulkhead (233) was about 12 feet long (235-36). Only a single nail remained to hold the plank in place on the bulkhead (238-39). *Respondent* introduced an accident report from the Petitioner's stevedore employer (Exhibit W) which confirms that "the timber was held in place by a single nail" (2257).

Mircovich's account of the accident was further corroborated by Respondent's own log book (exhibit 10), which reads, in pertinent part, as follows:

> "1335 injury reported—it was reported that Ottavio Bussanich of 260 First Street, Hoboken, New Jersey . . . while working in 3L/H sustained a head injury—*witnesses stated that while standing in port cell next to after opening to center cell a piece of 2 × 12 fell from bulkhead striking him on the head.*" (2255) (emphasis added).

B. Relevant Custom and Practice

Respondent's Captain, Norman Kjeldsen, testified that the CONTENDER was chartered to the Military Sealift Command in 1974, and part of its mission was the carriage of ammunition to Vietnam. The vessel would load for Vietnam on the east coast, typically discharge in Vungtau or Kat Lai, and then carry a cargo of household goods back to east coast ports, such as Bayonne (302, 307).

Wooden ammunition sheathing (or bulkhead) was always in place along the steel hull of the vessel before it would load for Vietnam (1379). Such sheathing was required by federal regulation, and built according to Coast Guard specifications, in order to protect the cargo and the ship (46-47). New sheathing had to be installed prior to loading because at least 40 percent of it would be lost during discharge (295-96). An officer of the

ship was always present during this installation in order to ensure that it conformed to specification (311).

Captain Kjeldsen stated that anywhere between 40 percent to 80 percent of the wooden sheathing was damaged or destroyed each voyage upon discharge (304-05), and the "voyage that included October 23, 1984 . . . wouldn't be any different from other voyages" (305). As a matter of practice, the damaged sheathing was repaired and reinforced during the return trip from Vietnam. As the Captain put it: "Yes, we tighten them up, and if shoring is broken, we resecure it or add to it." (308). Officers of the ship inspect the sheathing after every discharge in order to ascertain the damage and evaluate the repairs which will be required (309, 313).

Captain William C. Ash testified on behalf of Petitioners, and said that "a very careful inspection" of the sheathing was required in order to assure "that those boards that were still there were properly nailed and properly secured" (69-70). Prior to arrival in a discharge port such as Bayonne, the proper custom and practice is to thoroughly inspect the vessel, "to see to it that the vessel is ready for the longshoremen, that is, as to cleanliness, sanitary conditions, seaworthy condition, and its fixtures properly in place." (61).

Captain Ash also noted that Respondent is a member of the New York Shipping Association, a group of employers engaged in the shipping business in the Port of New York, which includes facilities in New Jersey situated on the Hudson River (49-50). In conjunction with the International Longshoremen's Association, a Safety Committee was formed "for the purpose of promulgating and promoting longshore safety in the Port of New York" (96). This resulted in the publication of the Joint Maritime Safety Code in 1970 (Exhibit 3) (23a-39a, 2222-52), which "codified all the existing customs and practices . . . and put them into a publication delineating who was responsible for what on the ship . . ." (96). The Code is in effect as originally published (97), and Respondent has not denied in proceedings below that its collective bargaining agreement

requires it to comply with Code provisions. As noted above, Part C, Section 1, of the Code, entitled "Responsibilities and Duties of Vessels of all Types", states that the vessel and its crew shall "*maintain in safe condition* for use all . . . *work spaces* which are to be used in stevedoring operations" (31a) (emphasis added). Captain Kjeldsen admitted that he has a copy of the Code (321) and generally follows its provisions (322). The Introduction to Code states that it represents "the commonly agreed on practices for working together safely" (25a). The purpose of the Code is also made clear:

> "Each of these practices has proved of value in helping to prevent injuries . . . . This manual applies to all stevedoring operations. It is intended to indicate the minimum recommendation for the prevention of accidents . . . ." (25a).

C. The Errors Below and the Preservation of Same

Petitioners' theory was that the Code provided "some evidence" of a custom and practice that imposed a *continuing* obligation on a shipowner, in the Port of New York, to take reasonable steps to *maintain* a safe place for longshoremen to work, even after commencement of cargo operations. The claim is that, at a minimum, the Code requires periodic inspections of the work space from the deck above, by a ship's officer, in order to detect and warn of potentially hazardous conditions. The obligation would be especially applicable where, as under Petitioners' theory of the case herein, the dangerous condition emanated from an area under the *control* of the shipowner. Indeed, as the New York Court of Appeals recognized in its opinion below, the "ammunition bulkhead or sheathing, . . . without dispute had nothing to do with the cargo operation." (4a).

The peculiar facts of this case provided a solid foundation for the potential argument that such periodic inspections, by any officer, might have prevented the accident. If, as Petitioners argued, the timber fell from the ammunition bulkhead

(227-28; 2255), it necessarily fell from a considerable distance above where the men were working. An officer on the deck above, inspecting the operation, might well have determined that the 12 foot plank (235-36) was beginning to work loose. He easily could have warned the longshoremen of the imminent danger. And he would have been in a better position to detect the danger than the men below. Of course, it was the Respondent's theory that the timber fell from a cargo fence erected during unloading operations by the longshoremen themselves (4a). Under this theory, the danger would have been much harder to detect from an officer's vantage point, but the verdict of the jury below was general, and there is no way of knowing whose theory of the case was preferred.

However, Petitioners were never permitted to explicate their argument that the Code was custom and practice that constituted "some evidence" of a duty, on the Respondent's part, to make such periodic inspections. Petitioners' efforts were "nipped in the bud" when their expert, Captain Ash, was not allowed to elaborate upon the meaning and application of Part C, Section 1 of the Code. Justice Tyler ruled that opinions were not to be permitted about documents in evidence (134-35).

Later in the trial, Petitioners' counsel requested a charge setting forth the Code provisions (1904). But Justice Tyler denied that request (1904). Counsel persisted, arguing that "plaintiff is entitled to have a charge that if they violated that, that's some evidence of negligence Your Honor, on a safe place to work, and the shipowner is the primarily responsible [party]." (1905). Justice Tyler responded that "The parties themselves cannot determine what's negligence and what isn't." (1905).

Both Petitioners' attorney and Respondent's attorney allied in their opposition to Justice Tyler's position. The latter agreed with Petitioners' attorney: "The code, which Mr. Heller has put in evidence, applies to both shipowners and stevedores,

and I agree that it sets the working standards." (1914-15). Respondent's counsel further stated:

> "Industry can set its own standards, and if there is a violation in—of the industry standards, then you have some evidence of negligence." (1929).

But Justice Tyler persisted in his refusal to charge the Code provisions (1927-28), and then compounded the prejudice when he later determined to strike the Code from evidence (1930-31). Both Petitioners and Respondent excepted to this ruling (1931-33).

Notwithstanding his refusal to charge the Code provisions, Justice Tyler did deliver a *main* change that embodied the *sense* of those provisions.

> "A shipowner's liability for negligence is based upon the failure of the shipowner's officers or crew or ship's representatives to perform the duty of which a reasonably prudent officer, crew member or ship's representative should have done under the circumstances, that is, to provide a reasonably safe place for the plaintiff to work, and to cause the remedy or removal of any dangerous or unsafe condition which it knows of, and in the exercise of reasonable care could discern or discover." (2156-57).

But later, without indicating that he would do so (2184-85), Justice Tyler delivered the following supplemental charge:

> "You are not permitted to speculate or guess as to what caused the accident. If you cannot determine from the testimony the cause of the accident, then you must find in favor of the defendant. A vessel need only be reasonably fit for its intended purpose or service, *and once an independent stevedoring contractor such as plaintiff's employer has started the cargo handling operation, it becomes the stevedore's duty, not the vessel owner's to take such steps as are necessary to maintain a safe place in*

> *which the stevedore's employees can work.*" (2193) (emphasis added).

Everyone *conceded* that cargo operations had started; thus, this instruction guaranteed a defendant's verdict. Even under the general duty enunciated by this Court in *Scindia*, *supra*, the shipowner's responsibility after cargo operations begin is *only* ended with respect to "dangerous conditions" that "develop within the confines of the cargo operation that are assigned to the stevedore" (451 U.S. at 172). These important limitations were absent from Justice Tyler's charge, and, under Petitioners' theory of the case, the wooden plank *did* fall from an ammunition bulkhead that "had nothing to do with the cargo operation" (4a). But the most important (and prejudicial) effect of the supplemental charge was that it clearly *precluded* any continuing duty, as under the Code, to *maintain* safety in the work space with measures such as periodic inspections.

Petitioners' counsel immediately requested permission to approach the bench, but that was denied (2193). He followed this with an exception (2195). Justice Tyler concluded the supplemental charge with further instructions on contributory negligence (2193-94), and the jury was told to retire (2195-96). The supplemental charge was later repeated (compounding the prejudice) in response to a jury note (2196-97, 2206-07, 2210-12). Petitioners' counsel vigorously objected once again (2211), but after this the defendant's verdict was quickly reached (2211-14).

REASONS FOR GRANTING THE WRIT

A. If the Decision of the New York Court of Appeals is Allowed to Stand, the Code's Safety Standards will be Emasculated.

As noted above, the Code was promulgated in 1970 after study by a Safety Committee jointly established by the New York Shipping Association and the International Longshoremen's Association (96). The Code "codified all the existing customs and practices . . . and put them into a publication delineating who was responsible for what on the ship . . . ." (96). The Introduction to the Code states that it represents "the commonly agreed on practices for working together safely" (25a), and its purpose was made clear: "It is intended to indicate the minimum recommendations for the prevention of accidents . . . ." (25a).

The Code is a 55 page document that sets forth the duties of various institutions and personnel in the Port of New York with great specificity (24a, 2224-52). It provides the kind of detailed standards that can only be produced by years of industry experience. Every day in the Port of New York, managers and workers look to the Code for guidance. Participants in New York's maritime enterprise rely upon other parties to meet their obligations under the Code. Indeed, Respondent's Captain Kjeldsen admitted that he has a copy of the Code (321) and generally follows its provisions (322).

But the decision below is a threat to the continuing vitality of the Code. The opening paragraph of that decision constitutes a surprisingly broad decree that the customs and practices embodied in this document set no finer obligations than the general negligence standard contained in the 1972 Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 901-950), to wit:

> "The central issue in these cases involving claims under the Longshoremen's and Harbor Workers' Compensation Act (the Act) (33 USC §§ 901-950) is whether the Joint Maritime Safety Code (the Code), prepared jointly by shippers and the longshoremen's union, has *expanded* the duties imposed upon shipowner under the Act. *We hold that it does not.*" (1a). (emphasis added).

As shown below, the Code sets forth *many* specific duties not within the general negligence standard of the 1972 Act. By its terms, the Code indeed "expands" upon the Act. If this "expansion" is not permitted, then most of the language of the Code is meaningless. Although this Court stated, in *Scindia*, that the "shipowner has no general duty by way of supervision or inspection" with respect to longshoremen *after* cargo operations have begun (451 U.S. at 172), it recognized a specific exception for "contract provision, positive law, or custom to the contrary" (*ibid*), an example of which was said to be New York's Maritime Safety Code (451 U.S. at 177, fn. 25). And the Code describes *many* shipowner duties which, by their terms, *necessarily* continue *after* the commencement of cargo operations (31a-39a). This will also become apparent in the discussion below.

The holding of the Court of Appeals to the effect that the Code does not "expand" duties under the Act is, we submit, especially odd in view of its recognition that "*Scindia* makes clear that regulation, contract or custom may place additional duties on the vessel . . . " (9a). The paradox is magnified by the rationale then supplied for not following the lead of *Scindia* on this matter; i.e., "the Second Circuit had never recognized the Code as establishing any such duty in New York Harbor." (9a). As the case law will demonstrate, the statement with respect to the Second Circuit is wrong. But we fail to understand why the ruling in *Scindia* did not take precedence on this matter.

Scindia was very clear on the point. The diminution of the shipowner's obligation upon commencement of cargo handling

operations may be overridden by conflicting custom and practice:

> "We are of the view *that absent contract provision, positive law, or custom to the contrary*—none of which as been cited to us in this case—the shipowner has *no general duty* by way of supervision or inspection to exercise reasonable care to discover dangerous *conditions that develop within the confines of the cargo operations* that are assigned to the stevedore." (451 U.S. at 172) (emphasis added).

The point was reiterated later in the Court's opinion:

> "The trial court and where appropriate, the jury, should thus be made aware of the scope of the stevedore's duty under the positive law. *But an equally necessary inquiry is whether the pertinent statutes, regulations, or custom place or assume a continuing duty on the vessel to repair defective ship's gear being used by the stevedore in the cargo operation.*" (451 U.S. at 176) (emphasis added).

Indeed, in discussing custom and practice in *Scindia*, this Court specifically referred to New York's Safety Code, even though *Scindia* was a west coast case. In a footnote to the quotation set forth immediately above, this Court stated that: "It may also be that the contract between the stevedore and the shipowner will have provisions specifically bearing on the dispute." (fn. 23). Then, in a following footnote (no. 25), this Court discussed the shipowner's claim that "Coast Guard regulations place no continuing duty on the shipowner to inspect the ship's equipment during cargo operations", going on to make the following observation:

> "We note with some interest that in affirming a jury verdict for a longshoreman in *Irizarry v. Compania Maritime Navegacion Netumar, S.A.*, petition for certiorari pending, No. 80-94, the Court of Appeals for the Second Circuit relied on the Joint Maritime Safety Code

> issued by the New York Shipping Association, Inc., the International Longshoremen's Association and the Port of New York Joint Safety Committee. *The Code was prepared pursuant to the terms of the labor agreement between the shipping association and the longshoremen's union and contains what is described as "the commonly agreed on practices for working together safely.*" The provision of the code relied on by the Court of Appeals states that '*[t]he owner, master and officers of the vessel shall supply and maintain in safe condition for use all ship's gear, equipment, tools and work spaces which are to be used in stevedoring operations.*' " (451 U.S. at 177, fn. 25) (emphasis added).

We submit that the Opinion of the Court in *Scindia*, delivered by Justice White, makes it very plain that the Code is precisely the kind of custom and practice that varies (and "expands") a shipowner's duties under the Act. Furthermore, the separate opinions of Justice Brennan and Justice Powell therein concur with respect to the overriding effect accorded to custom and practice. The former states that "the shipowner has a duty to inspect the equipment turned over to the stevedore or to supervise the stevedore if a custom, contract provision, law or regulation creates either of those duties . . . ." (451 U.S. at 179). The latter contains this language: "the customs and regulations allocating responsibility for particular repairs are highly relevant to this inquiry." (451 U.S. at 180).

Part C, Section 1 of the Code is the provision specifically here at issue. As further explained below, Petitioners contend that the vessel's obligation, set forth therein, to "maintain in safe condition for use all . . . workspaces" (31a), constitutes some evidence of a continuing duty to inspect and warn of dangers during ongoing cargo operations. In point of fact, other sections of the Code also provide examples of clear *continuing* duties. The general duty enunciated in *Scindia* does not continue after the commencement of cargo operations (451

U.S. at 172). Thus, the Code duties either "expand" *Scindia* or they do nothing at all.

Some examples of continuing shipowner duties, all enumerated under Part C ("Responsibilities and Duties of Vessels of all Types"), are as follows:

> "17. All walking and working areas shall be adequately illuminated. (33a).
>
> * * *
>
> 35. Vessels shall provide at least one safe and accessible ladder for each gang working in a hatch. (35a).
>
> * * *
>
> 44. When employees are required to work in the bight formed by the heel block, a preventer of at least ¾" diameter wire rope, rove reasonably snug and adequately secured, *shall be rigged*, or equally effective means shall be taken to hold the block and fall in the event that the heel block attachments should fail. (36a) (emphasis added).
>
> * * *
>
> 45. If the heel block is not so rigged as to prevent its falling when not under strain, it *shall be secured* to prevent alternate raising and dropping of the block. (36a) (emphasis added).
>
> * * *
>
> 60. Broken, split, or ill-fitting hatch covers *shall be replaced at once*. (38a) (emphasis added).
>
> * * *
>
> 64. All locking devices on beams, pontoons, or mechanical hatch covers shall be *maintained* in safe working condition. (39a) (emphasis added).
>
> * * *

> 65. Removal of strongbacks or beams that are jammed in position shall be the responsibility of the vessel. This also applies to mechanical hatch covers where similar conditions exist." (39a).

Thus, we submit that the Court of Appeals went far afield when it held that the Code did not "expand" any shipowner duties under the Act. And in finding that "the Second Circuit has never recognized the Code as establishing any such duty in New York Harbor" (9a), we submit that the Court misconstrued Second Circuit authority. Indeed, there is no such Second Circuit authority which holds that the Code is not applicable in the Port of New York. *Irizarry v. Compania Maritime Navegacion Netumar, S.A.*, 1981 A.M.C. 2424 (not otherwise reported) (2d Cir. 1980), *cert denied* 451 U.S. 969 (1981), referred to in *Scindia* as noted above, had the following to say about the Code:

> "As a majority of the panel in *Giglio v. Farrell Lines, Inc.*, 1980 AMC 373, 613 F2d 429 (2 Cir. 1980) recognized, 29 C.F.R. 1918.91(c) ("Slippery conditions shall be eliminated as they occur.") does not relieve the vessel "*from responsibilities or duties now placed upon them by law, regulation or custom.*" 29 C.F.R. 1918.2(b). Moreover, the *Joint Maritime Safety Code*, Part C, sec. 1 provides, "The owner, master and officers of the vessel shall supply and maintain in safe condition for use all ship's gear, equipment, tools and work spaces which are to be used in stevedoring operations." (1981 A.M.C. at 2425-26) (emphasis added).

To the same effect is *Tragni v. Establissement Maritime Camille*, 705 F.2d 92 (2d Cir. 1983). Respondent's attorneys herein also represented the shipowner in *Tragni*, and, thus, they are intimately familiar with the fact that the applicability of the Code was extensively argued. The case involved the maintenance of a safe working place for longshoremen in the vessel's hold, and, after summary judgment for defendant, the

Second Circuit reversed. Although the decision does not specifically mention the Code by name, the reference is obvious:

> "Applying these principles to the present records, we conclude summary judgement was improper. Appellant has alleged facts which might establish the shipowner's negligence. The ladder was supplied and maintained by the vessel's crew, and permitting the cargo to be stored so that the longshoremen would have to traverse it without proper illumination to reach the ladder may have amounted to contenancing a hazard known to, and avoidable by, the shipowner. No permanent lighting fixtures were in place in any part of the hold. The ship appears to have been carrying only two portable lights, and crewmen were aware the longshoremen had complained these were insufficient. Moreover, *there is some evidence that custom and practice in the Port of New York requires the ship's crew, rather than the stevedore-employer, to furnish needed lighting on board ship, and to provide safe access to a ladder for each gang working in a hold.* Cf. *Scindia Steam Navigation Co. v. DeLos Santos*, 451 U.S. 156, 176, 101 S.Ct. 1614, 1626, 68 L.Ed.2d 1 (1981) (*necessary inquiry is whether custom places continuing duty upon vessel to repair defective ship's gear used by stevedore in cargo operation.*)" (705 F.2d at 94) (emphasis added).

Reference to the briefs in *Tragni* and the Code itself demonstrates that the sections of the Code which were urged upon the Second Circuit were those (quoted above) that relate to illumination (no. 17) (33a) and ladders (no. 35) (35a).

As far back as 1957, the Second Circuit confirmed the efficacy of a predecessor to the 1970 Code in setting legal responsibilities for participants in cargo handling operations. In *Ignatyuk v. Tramp Chartering Corp.*, 250 F.2d 198 (2d Cir. 1957), the Court of Appeals (by Judge Medina) affirmed the judgment for the plaintiff longshoreman entered by District Judge Edelstein after a non-jury trial, relying in part upon a

specific section of the Code to negate any contributory negligence by plaintiff himself (250 F.2d at 201). The plaintiff in *Ignatyuk* was injured by a guy wire which snapped off a metal deck cleat after sustaining heavy tension. The longshoremen themselves had placed the guy wire on the cleat, and Judge Edelstein sanctioned the procedure as being in conformity with the Code, to wit:

> "As the padeye near the cleat involved was covered by the deck cargo, *the rigging of the preventer guy* directly to the cleat by the longshoremen *was reasonable and proper under the circumstances, and in conformity with the Maritime Safety Code* compiled by the Maritime Association of the Port of New York, wherein the following appears: "Guys, preventers and other lines should each be fastened to a separate cleat or ring bolt." (133 F. Supp. at 856) (emphasis added).

The assertion by the Court of Appeals that the applicability of the Code was "tacitly rejected" by the majority in both *Giglio v. Farrell Lines, Inc.*, 613 F.2d 429 (2d Cir. 1980) and *Albergo v. Hellenic Lines, Inc.*, 658 F.2d 66 (2d Cir. 1981) is not well taken. The majorities therein simply have nothing to say on the subject. In fact, the dissent in *Giglio*, which would have applied the Code to the facts of that case, may have been concurred in on that point by Judge Sifton. *Irizarry, supra*, 1981 A.M.C. at 2425.

Whatever the precise status of the Code in present Second Circuit authority, the practical point is that the Code is being used on a consistent basis in the Port of New York as an important guide in the specifics of ensuring safe cargo handling practices (321-22). Is it now the case in the Port of New York that the shipowner no longer has any duties to *maintain* safety in the workspaces (31a)? Are there to be no more inspections by ship's officers? Is there no further obligation to provide lighting *during* the cargo operation (33a)? May the ship ignore its duty to "provide at least one safe and accessible

ladder for each gang working in the hatch" (35a) as long as one was provided at the *commencement* of cargo operations? If *this* is now the law, day-to-day practice in the Port of New York is due for a radical change—with safety as the loser.

B. The Trial Court Erred in Striking the Code from Evidence and in not Charging with respect to its Provisions.

In its opinion, the Court of Appeals stated that "Plaintiffs argue that the obligation to '*maintain* in safe condition for use all . . . work spaces' creates an ongoing duty to protect longshoremen against hazards created by the stevedore during the course of operations after the master has turned the vessel over." (9a). This seriously overstates Petitioners' position. Petitioners have never contended that Section 1 of Part C requires the shipowner to *generally* protect against hazards created by the *stevedore*. Although under *Scindia* it may, indeed, be the case that the shipowner must protect against those stevedore-created hazards of which it has *actual* knowledge when the stevedore is proceeding in an "obviously improvident" fashion with respect thereto (451 U.S. at 175-76), Petitioners merely say that Section 1 embodies custom and practice that is "some evidence" of a shipowner obligation to inspect periodically and warn of any hazards of which it does or should have knowledge. As mentioned above, in this particular case, with a timber hanging precariously from the bulkhead above, an officer located on the main deck, looking down through the hatch opening, would have been in a perfect position to spot the danger and provide a timely warning.

The Code is custom and practice codified (96). As such, it constitutes "some evidence" of legal obligation. *Trimarco v. Klein*, 56 N.Y. 2d 98, 105-06 (1982). And in the end, it is for the jury to say what the custom and practice is, based upon the evidence. Again, it is *Scindia* which tells us that the jury is not only to be "made aware of the scope of the stevedore's duty", but also informed where "regulations or custom place or assume a continuing duty on the vessel . . . ." (451 U.S. at 176).

Thus, Justice Tyler erred when he struck the Code from evidence (1930-31). This is reversible error. *Tropea v. Shell Oil Co.*, 307 F.2d 757, 763 (2d Cir. 1962); *Philips v. Roux Laboratories*, 26 App. Div. 549, 145 N.Y.S. 2d 449, 452 (1st Dept. 1955). Respondent will undoubtly argue that Section 1 of Part C had already been read to the jury (99-100), but the important thing is that Petitioners' expert was not allowed to elaborate upon the meaning of the Code (134-35). Furthermore, Petitioners' counsel could hardly *argue* the Code in his summation, inasmuch as it was no longer properly in evidence. *Summation* is the time to bring to home to the jury the particular construction of a document which a litigant wishes to advance. Finally, because Justice Tyler refused to charge with respect to the Code provision, the jurors had no way to know how to apply the Code, if, indeed, they could remember the passage read to them at the beginning of the trial. Thus, the prejudice was evident.

Respondent will also inevitably argue that the language of the Code ("supply and maintain in safe condition for use all . . . workspaces") establishes a duty to "supply" a safe place at the time the hatch is turned over to the stevedore, and not thereafter. But such an interpretation requires the reader to ignore the plain meaning of the verb "maintain", or to construe it in an awkward way. "Maintain" clearly implies a *continuing* obligation, and it is only by construing it in such a fashion that all of the words can be given their common meaning. In any event, the short answer is that the meaning of the section was for the jury.

Not only did Justice Tyler refuse to charge the Code, he delivered a supplemental charge that absolutely precluded any notion of a continuing duty on the part of a shipowner, to wit:

> "Once an independent stevedoring contractor such as Plaintiff's employer has started the cargo handling operation, it becomes the stevedore's duty, not the vessel owner's, to take such steps as are necessary to maintain a safe place in which the stevedore's employees can work." (2193).

Although the main charge on the subject of the shipowner's duty was unremarkable (2156-57), an erroneous supplemental charge is not cured by a correct prior charge. *Bollenbach v. United States*, 326 U.S. 607, 612 (1946); *DeLima v. Triniad Corporation*, 302 F.2d 585, 587 (2d Cir. 1962). Furthermore, a supplemental charge is especially critical because of the importance which the jury inevitably attaches to it. *Norfleet v. Isthmian Lines, Inc.*, 355 F.2d 359, 362 (2d Cir. 1966).

The particular prejudice of the supplemental charge herein is demonstrated by the sequence of events after its delivery. A jury note was received which evidenced some confusion (2196-97), and the jurors thereafter told the clerk that "we are really stuck" (2197). The jury re-entered the courtroom (2205) and the foreman said that he wanted "the definition of negligence" in the supplemental charge re-read (2206-07, 2210). After Justice Tyler read a portion of the supplemental charge prohibiting "speculation" (2210), juror no. 5 said that they were not interested in that—they wanted the portion that "had to do with responsibility" (2210-11). Justice Tyler then re-read (and, in effect now doubly emphasized) the supplemental charge regarding a stevedore's alleged responsibility for safety when cargo operations have begun (2211). After he did this, the jury indicated that they had heard what they wanted (2212). Petitioners' counsel objected again (2211), but the defendant's verdict was announced shortly thereafter (2213-14). It was the supplemental charge—the unqualified cessation of shipowner responsibilities—that finally did the Petitioners in.

C. The Supplemental Charge was Otherwise Erroneous Because it Stated, without Qualification, that the Shipowner's Duty Ceases when Cargo Operations Begin.

The supplemental charge informed the jury that the shipowner's duty *ended* when cargo operations commenced (2193). This was *doubly* erroneous. Not only did it contravene the Code provisions discussed above, but, in addition, under the facts of this case, it contravened well-settled principles of

maritime decisional law. It is established that a shipowner *never* loses its responsibility with respect to conditions located in areas that remain in its *control*, with respect to conditions which it *created*, or with respect to conditions that existed *prior* to the commencement of cargo handling operations. Again, the point is established by *Scindia*:

> "It is also accepted that the vessel may be liable if it actively involved itself in the cargo operations and negligently injures a longshoreman *or if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation*." (451 U.S. at 167) (emphasis added).

No case and no authority has ever doubted the proposition that the shipowner retains a duty of "reasonable care" to all persons lawfully aboard the vessel with respect to those areas under its *control*. *Taliercio v. Compania Empressa Lineas Argentina*, 761 F.2d 126, 128 (2d Cir. 1985); *Sarauw v. Oceanic Navigation Corp.*, 622 F.2d 1168, 1172 (3rd Cir. 1980); *Barulic v. French Line*, 75 A.D. 2d 761, 427 N.Y.S. 2d 815 (1st Dept. 1980), *cert. denied* 451 U.S. 908 (1981). In areas not under the exclusive control of the stevedore, the longshoreman is like any other business invitee to whom the shipowner owes a duty of reasonable care under the circumstances. *McDonald v. United States*, 321 F.2d 437, 440 (3rd Cir. 1963), *cert. denied*, 475 U.S. 969. To the same effect is *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959) and *Copeland v. Oil Transport, Inc.*, 352 F. Supp. 11, 17 (S.D. Ala. 1973).

In this case, it is of utmost importance to appreciate the distinction between conditions which *arise* in the work space and conditions, arising elsewhere, which *impact* the work space. The stevedore is generally responsible for the former, and the shipowner is responsible for the latter. Any confusion on this point is entirely eliminated by the case of *Turner v. Costa Line Cargo Services, Inc.*, 74 F.2d 505 (5th Cir. 1984):

> "Generally, the vessel owner is entitled to *rely on the stevedore to protect his employees from conditions that 'develop within the confines of the cargo operations that are assigned to the stevedore.' Id. However, the vessel owner is not relieved of responsibility for conditions arising outside the area assigned to the stevedore.* See *Helaire v. Mobil Oil Co.*, 709 F.2d 1031, 1036 (5th Cir. 1983) (the owner has a duty to avoid exposing the longshoremen to harm "from hazards under the active control of the vessel.") citing *Scindia*, 101 S. Ct. at 1626). *Thus, the vessel owner is relieved of liability only if the condition arises in an area turned over to the stevedore for cargo operations.*" (744 F.2d at 508) (emphasis added).

It was Petitioners' claim that the timber fell from the ammunition bulkhead, and, as the Court of Appeals recognized below, that bulkhead, "without dispute, had nothing to do with the cargo operation." (4a). Petitioners were entitled to a charge (not vitiated by a superceding later charge) that embodied their claim and set forth a general duty to warn of dangerous conditions emanating from the shipowner's area of control.

Under *Scindia*, shipowner responsibility also obtains where the condition in question existed *prior* to the turnover of the area to the stevedore:

> "Yet it is quite possible, it seems to us, that Seattle's [stevedore's] judgment in this respect was so obviously improvident that *Scindia*, if it knew of the defect and that Seattle was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoreman, and that in such circumstances *it had a duty to intervene and repair the ship's winch. The same would be true if the defect existed from the outset and Scindia must be deemed to have been aware of its condition.*" (451 U.S. at 175-76) (emphasis added).

There was copious evidence adduced below to the effect that the defective timber "existed from the outset." Respondent's Captain Kjeldsen testified that a minimum of 40 percent of the sheathing had been damaged on discharge of the ammunition in Vietnam (295-96), and he also made it clear that the ship's crew had a duty to repair, or to tighten up the sheathing on the return trip (308-09). Thus, if the jury had chosen to believe Respondent's own Captain, then Mr. Bussanich may well have been injured by a condition which "existed from the outset", as to which the shipowner had an unmitigated "duty to intervene and repair".

The decisions which have been rendered subsequent to *Scindia* make it plain that, even *after* cargo handling operations begin, the shipowner also retains its duty with respect to conditions which it *created*. *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110, 116 (5th Cir. 1981); *Subingsubing .eardon Smith Line, Ltd.*, 682 F.2d 779, 780 (9th Cir. 1982); *DiRago v. American Export Lines, Inc.*, 636 F.2d 860, 868-69 (3rd Cir. 1981), *cert. denied* 449 U.S. 890. Captain Kjeldsen testified that the damaged and dangerous sheathing was created during discharge of the ammunition cargo in Vietnam (295-96, 304-05). And it makes no difference, with respect to the shipowner's ultimate liability, that the vessel's crew members did not create the dangerous condition *themselves*, but, rather, that such condition was created by authorized third persons. *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, 1304 (9th Cir. 1981), *cert. denied* 103 S. Ct. 294; *Clay v. Lykes Bros. S.S. Co., Inc.*, 525 F. Supp. 306, 309 (E.D.La. 1981).

To be sure, Respondent has always advanced its "cargo fence" theory (4a), and if that theory were to be accepted, it is arguable that the defective condition could have arisen in an area and at a time which would place no remedial duty upon the shipowner. However, *even if* Respondent's theory could find support in the competent evidence, the supplemental charge remains erroneous and requires a new trial, because it *precludes* application of the law governing *Petitioners'* theory.

Justice Tyler simply instructed the jury that the shipowner's duty "becomes the stevedore's duty" *as soon as* "an independent stevedoring contractor . . . has started the cargo handling operation. . . ." (2193). On the strength of all of the authority discussed above, we submit that this is prejudicially wrong. The shipowner will never lose its duty with respect to conditions that were either created by it, existed prior to turnover, or emanated from an area under its control, as to all of which Petitioners presented considerable proof. *Thus, at the very least, Justice Tyler was obliged to instruct the jury that the shipowner could never lose its overriding duty to warn and remedy unless preliminary findings were made which exonerated the shipowner on the issues of condition creation, time of creation, and control of the area.* Absent these findings, there was no justification for vitiating the shipowner's duty, or in any way transferring it to the stevedore. But Justice Tyler's charge makes absolutely no reference to these important issues. Of course, as we discussed above in Point B, if the Joint Maritime Safety Code is accepted as controlling, the shipowner's duty to inspect may continue *regardless* of the facts regarding the origin of the defective condition in question.

CONCLUSION

For the above-stated reasons, this petition for certiorari should be granted. Petitioners respectfully suggest that summary reversal and a new trial may be appropriate.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

No. 674

FRANCESCO CRUZ,

Appellant,

—v.—

AMERICAN EXPORT LINES, INC. et al.,

Respondents.

No. 675

OTTAVIA BUSSANICH et al.,

Appellants,

—v.—

UNITED STATES LINES, INC.,

Respondent.

Fred R. Profeta, Jr., & Morris Cizner, NYC, *for appellant.*

Michael N. Contignola, NYC, *for respondent.*

Fred R. Profeta, Jr., NYC, *for appellant.*

Daniel J. Dougherty, NYC, *for respondent.*

PER CURIAM

The central issue in these cases involving claims under the Longshoremen's and Harbor Workers' Compensation Act (the Act) (33 USC §§ 901-950) is whether the Joint Maritime Safety Code (the Code), prepared jointly by shippers and the longshoremen's union, has expanded the duties imposed upon shipowners under the Act. We hold that it does not.

I

Francesco Cruz, a longshoreman employed by John W. McGrath Corporation, a stevedore company, was injured on September 17, 1976 when a hi-lo being used by longshoremen to move bales of burlap struck a piece of dunnage, dislodging a 2400 pound burlap bag that struck him on the back of his foot. He commenced this action against American Export Lines, Inc. and Farrell Lines, Inc., the owners of "Export Builder", the vessel being discharged of its cargo by McGrath longshoremen at the time of the accident. Cruz alleged that the "stevedoring work on board [the Export Builder] was being performed under the general supervision and direction of defendant[s]", that hatch no. 3, where the work was being done, was "maintained, supplied and provided" by defendants and that defendants, through their negligence, *inter alia*, in failing to provide a safe place to work "violated the provisions of the Joint Maritime Safety Code of the Port of New York".

Following joinder of issue and completion of plaintiff's examination before trial, the shipowners moved for summary judgment contending that no legally sufficient cause of action against them had been set forth. The motion was based on Cruz's deposition testimony that at the time of the accident the cargo operations had been turned over to the stevedore company, which defendants argued was an independent contractor employing acknowledged experts in cargo handling who chose the manner and method of discharging the cargo. The shipowners asserted, therefore, that under the 1972 amendments to the Act, they were not liable for injuries sustained by a longshoreman during the stevedoring operation. In opposition to the motion, plaintiff submitted an affidavit of his fellow longshoreman Tomas Aviles, who asserted that he had complained to the ship's mate that "there was a lot of dunnage on the deck and between the bales" and had been told by the mate to "leave it" because "the crew would remove it when [the longshoremen] stopped work."

Special Term denied the motion, finding that there were triable issues of fact as to the nature and cause of the accident.

A divided Appellate Division reversed and granted the motion for summary judgment, holding that pursuant to *Scindia Steam Nav. Co. v De Los Santos* (451 US 156), "a shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore". The court reasoned that under the 1972 amendments to the Act, the stevedore, rather than the shipowner, is required to provide the longshoremen with a reasonably safe place to work and to comply with those requirements determined by the Secretary of Labor to be the precautions necessary to insure the safety of the longshoremen with respect to equipment and working conditions. The court rejected as "contrary to the prevailing weight of authority" plaintiff's contention that the Code places upon the shipowner a concurrent duty to maintain a safe workplace for stevedoring operations.

Plaintiff argues on this appeal that not only did defendants have a duty, imposed by the Code, to maintain the work place in a safe condition, but that they also assumed an affirmative duty to remove the dunnage and to prevent injury to plaintiff upon being advised that there was "a lot of dunnage on the deck" of the hatch. Moreover, plaintiff contends that the longshoremen were proceeding "improvidently" in the face of the danger created by the dunnage, and thus defendants were obligated to intervene since under the circumstances they could not reasonably anticipate that the stevedore would correct the dangerous condition.

II

Ottavio Bussanich, a longshoreman employed by Universal Maritime Service, Corp., was struck on the head by a piece of lumber that fell from somewhere above while he was discharging household goods from the lower hold of the "SS Pioneer Contender", a vessel owned by defendant. The five-week trial focused on the origin of that timber.

A fellow employee testified for Bussanich that the timber fell from an ammunition bulkhead or sheathing, that without dispute, had nothing to do with the cargo operation. In vessels carrying ammunition, sheathing is installed as a buffer between the ammunition and the vessel's metal hull to prevent sparks that could cause the ammunition and the vessel to explode. Here, independent contractors had installed sheathing some three months earlier in connection with a voyage by the vessel to Vietnam. Bussanich's theory was that the timber had been held in place by just one nail, that the vessel was on notice of this condition, and that this constituted a safety hazard for which the vessel should be held liable. The position of defendant shipowner was that the planking fell from a cargo bulkhead fence erected during unloading operations by the stevedore, whose duty it also was to dismantle the fence when operations were completed. Under this theory, the fence, and the hazard, were created by the stevedore.

During trial, plaintiff, without objection, had a section of the Code read to the jury. Plaintiff's expert testified that the Code was a codification of industry custom and practice, and that defendant had breached the section by failing to provide plaintiff a safe place to work. Defendant, in turn, asked the court to take notice of and charge a number of other code sections relating to the duty to make accident reports and the duties of stevedores to ensure the safety of longshoremen. However, the trial judge ultimately decided to strike from evidence the previously admitted portion of the Code and declined to charge any part of the Code. Instead, in its main charge the court instructed the jury as follows:

> A shipowner's liability for negligence is based upon the failure of the shipowner's officers or crew or ship's representative to perform the duty which a reasonably prudent officer, crew member or ship's representative should have done under the circumstances that is, to provide a reasonably safe place for the plaintiff to work, and to cause the remedy or removal of any dangerous or unsafe condition which it knows of, and in the exercise of reasonable care could discern or discover.

Thereafter, in response to a question from the jury during deliberations, the court instructed them that:

> You are not permitted to speculate as to what caused the accident. If you cannot determine from the testimony the cause of the accident, then you must find in favor of the defendant. A vessel need only be reasonably fit for its intended purpose or service, and once an independent stevedoring contractor such as plaintiff's employer has started the cargo handling operation, it becomes the stevedore's duty, not the vessel owner's to take such steps as are necessary to maintain a safe place in which the stevedore's employees can work.

The jury returned a general verdict in favor of defendant, and the Appellate Division affirmed.

III

At the outset, we note that our role here, is limited. In admiralty cases "we proceed cautiously cognizant that it is the general maritime law that governs the rights and liabilities of the parties" (*Alvez v American Export Lines*, 46 NY2d 634, 638, *affd* 446 US 274). Answers to the questions presented are "obtainable solely by recourse to Federal Law" (*id.* at 639). In this limited role we are obliged to apply "a controlling Supreme Court decision" if it exists or "a uniform Federal rule, albeit one established by lower Federal courts" (*id.*). In the absence of either we must proceed with deference to analyze the question under the general maritime law.

Prior to 1972, a longshoreman injured while loading or unloading a vessel received compensation payments from his employer and could also sue the shipowner on the theory that his injury was caused by the vessel's unseaworthiness or negligence (*Seas Shipping Co. v Sieracki*, 328 US 85). Proof of unseaworthiness required no proof of the shipowner's fault other than an unsafe, injury-causing condition on the vessel. This was true even though the condition was caused by the stevedore or its employee (*Scindia Steam Co. v De Los Santos*,

451 US 156, 164-165 & n 11). However, if the stevedore's conduct was a factor, the shipowner could recover against it for breach of express or implied warranty to handle the cargo in a reasonably safe manner (*Ryan Stevedoring Co. v Pan-Atlantic S.S. Corp.*, 350 US 124).

This scheme was radically changed by Congress in 1972, (*see*, Pub. L. 92-576, 86 Stat. 1251; *Scindia Steam*, 451 US 156, 165, *supra*). Balancing the conflicting interests of the vessel owner, the stevedore, and the longshoreman, Congress made three substantial changes:

> First, the level of benefits [payable to longshoremen by stevedores] was substantially increased, thereby increasing the likelihood that the statutory compensation recoverable without proof of fault would be adequate. Second, the shipowner's right to seek indemnity from the stevedore under *Ryan Stevedoring* was eliminated, thereby removing a category of litigation from the courts, placing more definite limits on the stevedore's insurance costs, and removing a potential source of conflict between the interests of employers and employees. Third, the shipowner's nearly absolute liability for unseaworthiness was eliminated, thereby further narrowing the area of potential litigation and increasing the relative importance of statutory awards as the favored method of compensation.

(*Rodriguez v Compass Shipping Co.*, 451 US 596, 616 [footnotes omitted]; *see*, *Scindia Steam*, 451 US 156, 165, *supra*.)

Thus, section 905(b) of the Act was amended to provide in part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party * * * and the employer shall not be liable to the vessel for such damages directly or indirectly * * * . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or

> a breach thereof at the time the injury occurred * * * . (33 USC 905[b].)

Scindia Steam, the Supreme Court's most definitive statement to date in this area, has made clear that, at a minimum, a shipowner must be found negligent before it may be held liable. "Congress intended to make the vessel answerable for its own negligence and to terminate its automatic, faultless responsibility for conditions caused by the negligence or other faults of the stevedore" (451 US at 168). The court also noted, however, that in some circumstances the vessel will not be liable in negligence even if it fails to prevent foreseeable injuries to longshoremen:

> Cases holding the vessel liable on the ground that it owed nondelegable duties to protect the longshoremen from injury were rejected [by Congress]. It would be inconsistent with the Act to hold, nevertheless, that the shipowner has a continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the loading or unloading process. Such an approach would repeatedly result in holding the shipowner solely liable for conditions that are attributable to the stevedore, rather than the ship. True, the liability would be cast in terms of negligence rather than unseaworthiness, but the result would be much the same. "[C]reation of a ship owner's duty to oversee the stevedore activity and insure the safety of longshoremen would * * * saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b)."

(*Scindia*, 451 US at 168-169, *supra* [footnotes omitted]; *see also id.* at p 181 [Powell, J., concurring].)

The *Scindia* court further held that "absent contract provision, positive law, or custom to the contrary * * * the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore" (451 US at 172, *supra*). This

does not mean, however, that the vessel owes no duty to a longshoreman (*Lieggi v Maritime Co. of the Phillipines*, 667 F2d 324, 328). This shipowner has a duty to exercise reasonable care to turn over the vessel and its equipment to the stevedore in reasonably safe condition and to warn the stevedore of hazards of which the owner is or should be aware (*Scindia*, 451 US at 166 *supra*; *Evans v Transportacion Maritime Mexicana*, 639 F2d 848, 855. Additionally, "the vessel may be liable if it actively involves itself in the cargo operations" (*Scindia*, 451 US at 167, *supra*). Moreover, although the vessel has no general duty to supervise the stevedore, a vessel with knowledge of a dangerous condition has a duty to intervene when the stevedore's decision to continue operations despite the danger is "obviously improvident" (*id.* at 175)[1]. In the cases now before us, the plaintiffs claim that the Code constitutes the "contract provision, positive law or custom" exceptions referred to in *Scindia* necessary to enlarge the vessel's duties.

The Code in its introduction best describes its scope and intended effect:

> This Manual presents the commonly agreed on practices for working together safely. These practices have been developed as a result of the experience and suggestions of longshoremen, supervisors, the NYSA-ILA Port of New York Joint Safety Committee, and other maritime safety specialists throughout the country.

* * *

1 We note the Second Circuit has rejected the Appellate Division's reasoning in *Cruz* that the regulatory and statutory scheme of the Occupational Safety and Health Administration places primary responsibility for the safety of the longshoremen upon the stevedore so as to relieve the shipowner of any obligation (*Lieggi v Maritime Co. of the Phillipines*, 667 F2d 324). "[T]he regulations do not provide that the stevedore's responsibility for the condition of the work spaces is exclusive. The fact that the stevedore has a duty to keep those areas clear does not prevent the shipowner from having one as well; if both the shipowner and the stevedore neglect their duties they may be concurrently negligent" (667 F2d at 328, n. 8; *see also, Lubrano v Royal Netherlands Steamship Co.*, 572 F2d 364; *Lopez v A/S D/S Scendberg*, 581 F2d 319).

> This Manual applies to all stevedoring operations. It is intended to indicate the minimum recommendations for the prevention of accidents and should neither conflict with statutory provisions of the United States or other local governmental agencies nor prevent the use of improved gear or methods which provide equal or better protection and efficiency. It is not intended that the duties or responsibilities shall be limited to those outlined in this Manual.

In support of their claim that the Code enlarges the vessel's duties, plaintiffs point to section 1 of Part C, which provides that "[t]he owner, master and officers of the vessel shall supply and maintain in safe condition for use all ship's gear and equipment, tools and work spaces which are to be used in stevedoring operations." Plaintiffs argue that the obligation to "*maintain* in safe condition for use all * * * work spaces" creates an ongoing duty to protect longshoremen against hazards created by the stevedore during the course of operations after the master has turned the vessel over. Although *Scindia* makes clear that regulation, contract or custom may place additional duties on the vessel, the Second Circuit has never recognized the Code as establishing any such duty in New York harbor. To do so would be inconsistent with section 905(b) of the Act and would "saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate" (*Scindia*, 451 US at 169).

Plaintiffs reply upon *Irizarry v Compania Maritima Navegacion Netumar, S.A.* (1981 AMC 2424 [2d Cir. 1980], *cert denied* 451 US 969), where the Second Circuit, in a memorandum without any precedential effect (*see*, § 0.23 of the Rules of the Second Circuit), cited Part C, § 1 of the Code in affirming a judgment in favor of a longshoreman who fell while walking across the icy surface of a container. They also rely upon the Supreme Court's statement at the end of a footnote in *Scindia*, that it noted "with some interest" the *Irizarry* decision and its apparent reliance on the Code (*see*, 451 US at 177 n 25). *Irizarry*, however, is inapposite because

there the hazardous condition—snow and ice—came into existence before the vessel entered port, long before the stevedore took control. Moreover, the Second Circuit viewed its *Irizarry* decision as consistent with *Giglio v Farrell Lines, Inc.* (613 F2d 429), where the court affirmed a dismissal of a claim based on a hazardous condition—spilled brine and graphite creating a slippery surface—created by the stevedore during unloading operations. The majority in *Giglio* tacitly rejected Judge Oakes' argument in dissent that the Code created a duty on the vessel's part to keep the area safe. Indeed, although Judge Oakes cited section 1 of Part C, even he relied principally on other sections of the Code dealing specifically with a vessel's obligations to make available and apply sand to cover spills of slippery substances. In *Albergo v Hellenic Lines, Ltd.* (658 F2d 66), where the plaintiff was injured when he tripped on rope cuttings that the stevedore had a duty to clear away a majority of the Second Circuit in affirming a grant of judgment to the vessel notwithstanding the verdict, again tacitly rejected Judge Oakes' position that the general language of section 1 of Part C of the Code imposed on the vessel a duty to keep a work area clear while it is under a stevedore's control.

As District Judge Haight observed in *Lubrano v Companhia de Navegacao Lloyd Brasileiro* (575 F Supp 1541, 1548-1549):

> [Judge Oakes' position] is a dissenting view, and I conceive it to be contrary to the prevailing weight of Second Circuit authority. Moreover, the majority view is clearly correct. A vessel owner's joint fault under the Safety Code would render the owner liable for the full amount of the injured longshoreman's injuries, even if the vessel owner had not created the condition, the independent stevedore had negligently failed to correct it, and the vessel owner could not have reasonably anticipated that failure. That result would be inconsistent with the thrust of recent authority holding that the vessel owner may rely upon the expertise of the stevedoring contractor. * * * [I]n practical result, the vessel owner would assume sole responsibility to an injured longshoreman in circum-

stances where the federal regulatory scheme places primary responsibility upon the stevedoring contractor.

Thus it is clear that, under the federal rule we are bound to apply, the Code does not impose additional duties on the shipowner.

IV

Applying the above-stated principles to the cases now before us, we hold in *Cruz* that the Appellate Division erred in granting summary judgment and dismissing the complaint. Mindful that issue finding and not issue resolution is a court's proper function on a motion for summary judgment, and drawing all inferences in plaintiff's favor as we are bound to do, we conclude that factual issues exist requiring a plenary trial. There is a question whether the vessel assumed responsibility for removal of the dunnage (see *Lieggi v Maritime Co. of Phillipines*, 667 F2d 324, *supra*), or whether the vessel improperly directed the stevedore to keep working despite a known hazard that the vessel knew would not be corrected (see *Lubrano v Royal Netherlands S.S. Co.*, 572 F2d 364).

In *Bussanich*, the court's charge adequately stated the controlling legal principles to be applied by the jury in resolving the sharply contested issues of fact. While the court's supplemental charge may not have fully explicated the possibility of the shipowner's concurrent liability for its negligence, it is clear that had the jury accepted plaintiff's theory, the charge properly would have allowed the jury to find for plaintiff.[2]

V

In *Cruz*, the order of the Appellate Division should be reversed, with costs, and defendants' motion for summary

---

2 We have considered plaintiff's other contentions and find them to be without merit.

judgment denied. In *Bussanich*, the order of the Appellate Division should be affirmed, with costs.

* * *

Case No. 674—Cruz v American Export Lines, Inc.

Order reversed, with costs, and defendants' motion for summary judgment denied. Opinion Per Curiam. Chief Judge Wachtler and Judges Meyer, Simons, Kaye, Alexander and Titone concur. Judge Hancock took no part.

Case No. 675—Bussanich v United States Lines, Inc.

Order affirmed, with costs. Appellant's oral application to strike matter from respondent's brief denied. Opinion Per Curiam. Chief Judge Wachtler and Judges Meyer, Simons, Kaye, Alexander and Titone concur. Judge Hancock took no part.

Decided January 14, 1986

Order Granting Leave to Appeal to the Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of September A.D. 1985

Present,

HON. SOL WACHTLER,
Chief Judge, presiding.

Mo. No. 762

OTTAVIA BUSSANICH & ANO.,
Appellants,

—VS.—

UNITED STATES LINES, INC.,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been duly submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted.

/s/ DONALD M. SHERAW
Donald M. Sheraw
Clerk of the Court

Order of the Appellate Division Denying Reargument or Leave to Appeal

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 14, 1985.

M-1589

[Appeal Nos. 22394-94A]

Present—HON. JOSEPH P. SULLIVAN,
Justice Presiding,
ARNOLD L. FEIN,
E. LEO MILONAS,
BENTLEY KASSAL,
Justices.

OTTAVIO BUSSANICH and ANTONIA BUSSANICH,
Plaintiffs-Appellants,

—against—

UNITED STATES LINES, INC.,
Defendant-Respondent.

The above-named plaintiffs-appellants having moved for reargument of or leave to appeal to the Court of Appeals from this Court's order entered on February 26, 1985.

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion, and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied in its entirety, with $20 costs.

ENTER:

HAROLD J. REYNOLDS
Clerk.

Order of the Appellate Division Appealed From

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 26, 1985.

22394-94A

Present—HON. JOSEPH P. SULLIVAN,
Justice Presiding,
ARNOLD L. FEIN,
E. LEO MILONAS,
BENTLEY KASSAL,
Justices.

OTTAVIO BUSSANICH and ANTONIA BUSSANICH,
Plaintiffs-Appellants,

—against—

UNITED STATES LINES, INC.,
Defendant-Respondent.

Appeals having been taken to this Court by the plaintiffs-appellants from the order of the Supreme Court, New York County (Andrew Tyler, J.), entered on March 31, 1983, which denied plaintiffs' motion to set aside the verdict; and from a judgment of said court entered on or about April 15, 1983, granting defendant judgment on the verdict, and said appeals having been argued by Fred R. Profeta, Jr., of counsel for the appellants, and by Daniel J. Dougherty, of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order and judgment so appealed from be and the same are hereby affirmed. Respondent shall recover of appellants one bill of $75 costs and disbursements of these appeals.

ENTER:

HAROLD J. REYNOLDS
Clerk.

Final Judgment of the Supreme Court, State of New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 06985/1976

ANTONIA BUSSANICH and OTTAVIO BUSSANICH,

Plaintiffs,

—against—

UNITED STATES LINES, INC.,

Defendants.

The issues in this action having been brought on regularly for trial before Justice Andrew R. Tyler with a jury at a Trial Term, Part 19, of this Court held at New York, New York on the 10th day of November, 1980 thru the 17th day of December, 1980, and the plaintiffs having duly appeared by Kenneth Heller, Esq., their attorney, and the defendant having duly appeared by Kirlin, Campbell & Keating, Esq., its attorneys, and the issues having been tried and the jury having rendered a verdict on the 17th day of December, 1980, in favor of the defendant, against the plaintiffs and the costs and disbursements of the defendant having been duly taxed in the sum of $537.75.

Now on motion of Kirlin, Campbell & Keating, attorneys for the defendants, it is

ADJUDGED, that the defendant, United States Lines, Inc., with its principal place of business at 27 Commerce Drive, Cranford, New Jersey, have judgment on the verdict and recover of the plaintiffs, Antonia Bussanich and Ottavio Bussanich residing at 54 Jackson Street, Little Terry, New Jersey, the sum of $537.75, the amount of defendant's costs and disbursements as taxed, and that the defendant have execution therefore,

Judgment signed and entered this 15th day of April, 1983.

/s/ NORMAN GOODMAN
Clerk

Order of the Supreme Court,
State of New York

SUPREME COURT—NEW YORK COUNTY
TRIAL TERM—PART 19

Index No. 16985/1976

Cal. No. 19429

OTTAVIO BUSSANICH,

Plaintiff,

—against—

UNITED STATES LINES, INC.,

Defendant.

TYLER, J.:

Plaintiffs' motion for a new trial pursuant to CPLR 4404(a) seeking to set aside a jury verdict in favor of the defendant, and also seeking a new trial, is disposed of as hereinafter indicated.

Plaintiff alleges as error at the trial: (1) the failure of the court to limit instructions to the jury "reasonable care under the circumstances" and instructing the jury in a supplemental charge:

> "You are not permitted to speculate or to guess as to what caused the accident. If you cannot determine from the testimony the cause of the accident, then you must find in favor of the defendant. A vessel need be only reasonably fit for its intended purpose or service, *and once an independent stevedoring contractor such as plaintiff's employer has started the cargo handling operation, it becomes the stevedore's duty, not the vessel owner's, to take such steps as are necessary to maintain a safe place in which the stevedore's employees can work.*"

(2) the failure of the court to instruct the jury concerning alleged violations of certain Federal safety regulations and the Joint Maritime Safety Code as evidence of negligence, and (3) the receipt in evidence by the Court of the Charter Party Agreement and certain accident reports.

This case involved a claim of negligence by the plaintiff, a longshoreman employed by the Universal Terminal and Stevedoring Corp. on defendant's vessel the S.S. Pioneer Contender. Plaintiff was injured on October 23, 1974 when a two by four plank fell on him while he was working in the lower hole of that vessel. Plaintiff specifically alleged negligence of this defendant in causing and allowing the bulkhead or sheathing to be constructed in an improper manner and in failing to discover and correct this condition and in failing to provide to the plaintiff a safe place to work.

The Supreme Court of the United States in *Scindia Steam Nav. Co. Ltd. v. De Los Santos*, 451 U.S. 156; 101 S.Ct. 1614 (1981) analyzed a shipowner's duty to a longshoreman under the 1972 amendments to the Longshoremens' and Harbor Workers Compensation Act (Sec. 5(b)), 41, 33 USCA Sections 905(b) 941) which Act was intended to make a vessel owner answerable for its own negligence and to end such owners automatic, faultless responsibility for conditions caused by the negligence or actions of the stevedore. Accordingly, that case held that a shipowner does not have a continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the loading or undloading process.

The court stated at page 1622:

> "Considering first the position of the Court of Appeals, we cannot agree that the vessel's duty to the longshoreman requires the shipowner to inspect or supervise the stevedoring operation. Congress intended to make the vessel answerable for its own negligence and to terminate its automatic, faultless responsibility for conditions caused by the negligence or other defaults of the stevedore. Cases holding the vessel liable on the ground that it owed non-delegable duties to protect the longshoremen

from injury were rejected. It would be inconsistent with the Act to hold, nevertheless, that the shipowner has a continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the loading or unloading process. Such an approach would repeatedly result in holding the shipowner solely liable for conditions that are attributable to the stevedore, rather than the ship. True, the liability would be cast in terms of negligence rather than unseaworthiness, but the result would be much the same. "[C]reation of a shipowner's duty to oversee the stevedore's activity and insure the safety of longshoremen would . . . saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b) .".", and again at page 1624:

" . . . We are of the view that absent contract provision, positive law or custom to the contrary—none of which has been cited to us in this case—the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. The necessary consequence is that the shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself. This conclusion is plainly consistent with the congressional intent to foreclose the faultless liability of the shipowner based on a theory of unseaworthiness or nondelegable duty. The shipowner, within limits is entitled to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo operations. To the extent that the judgment of the Court of Appeals rested on a contrary view, we disagree."

An examination of the supplemental charge quoted above is that it makes a fair statement of the law in the context of the trial and the main charge to the jury which included instruc-

tions that if the jury found that the defendant's officers, crew or representatives failed to exercise reasonable care and that the failure to exercise such reasonable care was a proximate cause or contributed to the happening of plaintiff's accident then defendant was responsible, and further that defendant's responsibility included its knowledge, actual or constructive of a dangerous condition existing on the vessel, that further defendant was responsible to provide plaintiff with a reasonablely safe place to work and to take reasonable precautions for their safety, and responsible to remedy or remove any dangerous or unsafe conditions existing on the vessel, and as specifically requested by the plaintiff this Court instructed the jury:

> "You must determine, as the jury, on the basis of the evidence, presented at this trial, whether the ammunition bulkhead or sheathing was or was not properly secured to the hold of the vessel, and whether the Defendant had a reasonable opportunity to inspect the ammunition bulkhead or sheathing prior to the Plaintiff's accident, but failed to do so, and whether such failure was a proximate cause of Plaintiff's accident and resulting injuries.
>
> If you find that the Defendant failed to properly inspect the ammunition bulkhead or sheathing prior to Plaintiff's accident, you may find negligence on the part of the Defendant.
>
> If you find that a condition not created by the Defendant of inadequate or improper attachment of a section of the ammunition bulkhead or sheathing existed for a sufficient period of time prior to Plaintiff's accident for the Plaintiff to have discovered and corrected such condition, Defendant will nevertheless be charged with constructive notice of said condition, and such notice may be the basis for your finding the Defendant negligent herein since a ship owner may be held liable for an unsafe condition where the notice with which it is charged is only constructive."

The Court also instructed the jury regarding the obligations of plaintiff's employer, Terminal, as follows:

> "Now, the stevedoring contractor who hired the Plaintiff in this case is charged with the duty of selecting the method of stevedoring operations to handle cargo, and if this accident was caused solely by an unsafe method or manner of unloading, the Defendant ship owner may not be held liable.
>
> The duty of the stevedoring contractor who hired the Plaintiff includes the reasonable supervision of the method or manner of operation selected to be performed by their employees, and the duty to reasonably supervise the details of the stevedoring operation."

This Court concludes that the issue of defendant's negligence was fully and fairly presented to the jury and the instructions given, many of which were requested by the plaintiff's attorney, were within the language and spirit of the *Scindia* case. The fact that the jury's verdict was in favor of the defendant was in this Court's estimation justifiable in view of the credible evidence submitted by both parties on the issue of causation.

The plaintiff also cites as error the failure to additionally instruct the jury on the Joint Maritime Safety Code and the fact that a violation thereof is some evidence of negligence, and more particularly under *Responsibilities and Duties of Vessels of All Types*:

> "The owner, master and officers of the vessel shall supply and maintain in safe condition for use all ship's gear, equipment, tools and work spaces which are to be used in stevedoring operations."

Again the Court must point out to the plaintiff that I instructed the jury as follows on that issue:

> "To repeat, a ship owner owes the duty of exercising reasonable care towards those lawfully aboard the vessel

who are not members of the crew including a longshoreman such as the Plaintiff. The owner has a duty to see that such people as Plaintiff, while on board the ship, are not exposed to unnecessary risk, and to provide them with safety, and he is liable for negligence for his failure to take reasonable precautions for the safety of workers.

It is the duty of the ship owner to give notice and warning of any dangers or defects in the ship, and appliances, and to avoid creating any danger. His duty is to provide a reasonably safe ship for all who work on board."

In the Court's opinion, this language more than adequately covered the defendant's duties and obligations concerning the equipment and work spaces to be used in the stevedoring operation.

The final objections raised by the plaintiff in regard to the prejudicial admissions in evidence of the time charter agreement and the accident reports are really without merit or basis, and are but a last ditch attempt by the plaintiff to reverse this jury verdict and must fail for want of a legal basis. The plaintiff received a fair trial and the jury was properly instructed on the law.

In the final analysis this Court is not persuaded that the verdict should be set aside and plaintiff's motion pursuant to CPLR 4404(a) is denied.

Dated: March 30th, 1983

J.S.C.

Excerpts from Exhibit 3, the Joint Maritime Safety Code

JOINT MARITIME SAFETY CODE

PREPARED BY

NEW YORK SHIPPING ASSOCIATION INC.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

PORT OF NEW YORK JOINT SAFETY COMMITTEE

Effective Date January 1, 1970

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INTRODUCTION

Working safely is part of your job.

A common set of rules is necessary for a group of people to work together successfully — and safely.

This Manual presents the commonly agreed on practices for working together safely. These practices have been developed as a result of the experiences and suggestions of longshoremen, supervisors, the NYSA-ILA Port of New York Joint Safety Committee, and other maritime safety specialists throughout the country.

Each of these practices has proved of value in helping prevent injuries. Mostly, they are common sense precautions that all skilled workers naturally take because, in addition to preventing injuries, they are the best way of doing the job.

It is your responsibility to learn the safe practices presented in this Manual and to follow them at all times. You will then be doing your part toward preventing injury to yourself and your fellow workers.

This Manual applies to all stevedoring operations. It is intended to indicate the minimum recommendations for the prevention of accidents and should neither conflict with statutory provisions of the United States or other local governmental agencies nor prevent the use of improved gear or methods which provide equal or better protection and efficiency.

It is not intended that the duties or responsibilities shall be limited to those outlined in this Manual.

Under the terms of the labor agreement between N.Y.S.A. and the I.L.A. it was agreed that a Joint Maritime Safety Code be promulgated.

Accordingly, this task was started in June of 1968 and completed in December of 1969 by the following committee:

I.L.A.	N.Y.S.A.
J. Leonard	G. D. Barlow
D. Ahearn	G. H. E. Buxton
J. Bowers	R. H. Gallagan
J. Castellano	T. R. Alff
J. Condon	R. J. Anderson
F. R. Field, Jr.	A. W. Cash
F. Mattera	W. T. McCuen
A. Small	E. F. McIntyre
B. Terranova	D. H. McKay
J. Vincenzino	A. H. Moore
	W. P. O'Brien
	H. R. Rosengren

PART A
REPORTING AND INVESTIGATING ACCIDENTS

A. REPORTING:

1. An injury of any kind, irrespective of its severity, shall be reported immediately by the injured person to his immediate foreman, if he is physically able to do so. If the injured person is physically unable to

report the injury, it shall be reported by any person in possession of the facts. The immediate foreman shall see that the injured party is given prompt first-aid treatment.

2. The immediate foreman shall be responsible for reporting the injury to the timekeeper or such other person or office where such reports are recorded. This report shall be made by the immediate foreman if the injured employee is unable to do it himself.

3. The Secretary of the NYSA-ILA Joint Safety Committee shall be notified by the employer as soon as possible when a fatality resulting from an accident occurs.

B. INVESTIGATIONS:

1. The foreman or other designated person shall investigate every personal injury, determine its cause, and report to the employer.

2. The pertinent facts of accident occurrence shall be recorded on a suitable form for for purposes of analysis and prevention.

3. Each safety department, or the personnel designated to record accident data, shall keep accident records in a manner generally similar to that used by the New York Shipping Association, Inc., in its Annual Accident Report so that accident causes can be analyzed and reviewed at least once each quarter.

4. A copy of all accident reports shall be submitted to the NYSA-ILA Port of New York Joint Safety Committee for the purpose of analyzing, reviewing, and the prevention of accidents. Accident reports shall be for the the exclusive use of the Committee and they shall not be disclosed to any other person.

PART B
DEFINITIONS OF TERMS

For the purpose of this Code:

1. OPERATIONS AND STEVEDORING OPERATIONS mean the loading, unloading, moving or handling of cargo, ship's stores, gear, etc., in, on, or out of any vessel in the Port of Greater New York covered by the General Cargo Agreement between NYSA and ILA.

2. VESSEL is any floating structure used in commerce upon the navigable waters of the United States.

3. CARGO is all goods or merchandise transported by vessels and also all ship's stores, gear, etc., which may be moved in, on, or out of any vessel.

4. STEVEDORE is the person, firm or corporation contracting with the ship owner or his agents, to carry on stevedoring operations, as defined herein; or any person, firm or corporation engaged in stevedoring operations.

5. LONGSHOREMAN is a person who is employed by the stevedore for the purpose of loading or unloading or handling cargo or in similar operations.

6. HEAD FOREMAN, FOREMAN, OR ASSISTANT FOREMAN means a person employed by the stevedore to direct the longshoremen.

7. HATCH BOSS is the person employed to direct a gang of longshoremen.

8. GANGWAYMAN is the person employed in a gang to direct the movement of cargo in and out of the vessel.

9. GANG is a group of longshoremen working as a unit.

10. BOOM GUY is the device, consisting of pendants and tackles, attached to the head of the boom or derrick and used for keeping the boom in position for working cargo.

11. BRIDLE is a device consisting of a ring or shackle, from which are suspended two or more pendants of rope, wire, or chain, to the ends of which are attached hooks, shackles, or toggles.

12. BULL LINE OR BULL ROPE is an auxiliary rope or fall worked from a winch and rove through lead or snatch blocks or chocks to move cargo or other objects.

13. DECK is the horizontal plating, planking or floor covering the transverse beams of a vessel.

14. DUNNAGE is the material used in stowage for protecting cargo.

15. FALL OR CARGO FALL is the cable used to hoist cargo.

16. GANGWAYS, GANGPLANKS, OR ACCOMMODATION LADDERS are devices used for persons passing to or from the wharf or pier to the ship or vessel.

17. HATCH is a compartment in a vessel which holds cargo.

18. HATCH BOARD OR HATCH PLANK is the device placed on hatch beams, or strong backs and coamings to cover a hatch.

19. HATCHWAY is the opening in the hatch from the top deck to the hold.

20. HATCH COVERS can consist of pontoons, steel sections, automatic or manual steel folding lids.

21. HATCH BEAM, FORE AND AFTER, AND STRONG BACK are the devices used for supporting hatch covers to close the hatch.

22. PILOT LADDER, commonly called a JACOBS LADDER, is a device consisting of two parallel pieces of rope or wire joined together at intervals with a cross piece consisting of a flat tread or double rung, the whole ladder being flexible.

23. LADDER means an appliance or device consisting of two parallel pieces of wood or metal joined together at intervals by crosspieces.

24. LEAD BLOCK is the device consisting of a grooved sheave encased by a shell used to change the direction of the lead or line.

25. MACHINERY means the contrivances or machines, such as conveyors, motors, capstans, winches, windlasses, stationary cranes, elevators, etc., used in the operations.

26. PASSAGEWAY is a path or clear space other than a gangway or ladder through which persons move or cargo is passed.

27. PENDANT is the piece of wire or rope to which tackles, etc., are attached or suspended to shorten or lengthen the tackle.

28. MOBILE EQUIPMENT means any self propelled, power driven device used to handle cargo, containers, vans, or equipment.

29. PREVENTER GUY is the device consisting of an auxiliary wire attached to the head of the boom or derrick to relieve the boom guy of excessive strain in handling heavy drafts of cargo.

30. SHACKLE is a "U" shaped device of iron or steel with a pin through the ends used to secure the ends of guys, falls, topping lifts, etc., to ringbolts or cleats.

31. SHIP'S CARGO HANDLING EQUIPMENT means any device supplied and carried by the vessel used for the purpose of working cargo.

32. SLING is a device made of rope, wire, canvas, chains, boards, or other material used to hold cargo for the purpose of hoisting.

33. SLING LOAD OR DRAFT is that part of the cargo held by the sling.

34. STEVEDORING GEAR is the miscellaneous equipment furnished by the stevedore.

35. STOWAGE is the proper placing of cargo on or in vessels; tiering means the proper placing of cargo on piers or in warehouses.

36. TOPPING LIFT is the wire or rope attached to the boom head and mast or Samson or King Post or other fixed object by means of which the boom or derrick is raised, lowered or suspended.

37. 'TWEEN DECK OR 'TWEEN DECKS mean an intermediate deck situated between the main deck and the hold.

38. RIG is the manner in which the entire standing and running gear is arranged for one gang to work cargo.

PART C
RESPONSIBILITIES AND DUTIES OF VESSELS OF ALL TYPES

1. The owner, master and officers of the vessel shall supply and maintain in safe condition for use all ship's gear equipment, tools and work spaces which are to be used in stevedoring operations.

2. The owner, master and officers shall maintain order and discipline with respect to ship's crew, passengers, licensees and visitors, so as to avoid interference with the safe performance of stevedoring work.

3. All boom guys and gin blocks shall be secured by safety shackles or other type shackles, properly moused.

4. Adequate guards shall be provided on all winch working parts to which men or gear are exposed, and on all exposed steam pipes and other hot surfaces.

5. All projecting set screws on moving parts shall be replaced by counter-sunk or headless set screws unless moving part is so guarded that contact is impossible. No part of the set screws shall project above the surface.

6. Chipping and scaling of decks, bulkheads or sides of vessels by ship's crew or shipyard personnel shall not be carried on in the immediate vicinity

of hatches in which cargo is being worked. Excessive noise shall be eliminated.

7. Spray painting or sandblasting in the immediate vicinity of longshore operations shall be prohibited.

8. Ship's officers shall make certain that all electric arc or gas welding operations conducted during cargo handling operations shall be so shielded as to effectively prevent injuries to the eyes of employees in the vicinity.

9. A fire watch shall be provided when welding or burning is being done in any area in which longshoremen are working and necessary precautions shall be taken to prevent hot metal from falling on men working below.

10. Ship's crew or repair crews shall not be permitted to work in rigging over heads of men working in the hold, on deck, or on an apron.

11. Holes in strongbacks or beams for attaching bridles shall be located within reaching distance from the coaming so that the bridle may be attached without the men climbing on the strongback or beam.

12. Sufficient hatch boards of proper dimensions and adequate hand grips shall be provided for each deck being worked at all times.

13. Properly constructed deflectors of sufficient length, shall be furnished and used to prevent liquids from overboard discharges from reaching the pier apron or lighter.

14. When main decks are freshly oiled or painted a safe walkway shall be provided by use of sand, dunnage or other suitable non-slip material.

15. When cargo of highly flammable nature, such as cotton, sisal, jute, etc., is being worked, the ship shall be sure that necessary fire fighting equipment is in proper operating condition and readily available.

16. Garbage shall be disposed regularly. Garbage remaining on deck, pending collection, shall be kept covered. Garbage cans shall never be placed so that passageways are blocked or otherwise interfere with stevedoring operations.

17. All walking and working areas shall be adequately illuminated.

18. Portable lights shall be equipped with substantial reflectors and guards to prevent flammable and other material from coming in contact with the bulb, except that guards are not required where the construction of the reflector is such that the bulb is deeply recessed.

19. Portable lights shall be equipped with heavy duty electric cords and may be suspended by such cords only when the means of attachment of the cord to the light is such as to prevent the light from being suspended by the electrical connections. All connections and insulation shall be maintained in safe condition.

20. Lighting wires and fixtures for portable lights shall be so arranged as to be free from contact with drafts, running gear, or other moving equipment.

21. Portable lights shall be so arranged that they do not shine in the eyes of the winchdrivers or gangwaymen.

22. The vessel shall supply fittings of sufficient number and of adequate size to allow for the proper securing of the cargo gear for a safe operation. A distinction should be made between temporary fittings used for securing cargo and permanent fittings used for cargo gear. It is suggested that cargo gear fittings be painted white and temporary fittings high visibility yellow.

23. Members of the ship's crew shall not be permitted to smoke aboard ship or on the pier except in authorized places.

24. Ship's crew members shall not be permitted in the immediate vicinity of longshore operations except in the course of their duties, but in no event while under the influence of intoxicating liquor.

25. Where noxious gases may be present in holds or compartments, or when the ship has been fumigated, such places shall be declared clear of gas before employees are permitted to enter.

26. The gangway shall be kept properly trimmed at all times.

27. When a fixed tread accommodation ladder is used, and the angle is low enough to require employees to walk on the edge of the treads, cleated duckboards shall be laid over and secured to the ladder.

28. When the lower end of a gangway overhangs the water between the ship and the pier in such a manner that there is danger of employees falling between the ship and the pier, a net or other suitable protection shall be rigged at the foot of the gangway in such a manner as to prevent employees from falling from the end of the gangway.

29. If the foot of the gangway is more than one foot away from the edge of the apron, the space between them shall be bridged by a firm walkway equipped with railings with a minimum height of approximately 33 inches with mid-rails on both sides.

30. Where possible, supporting bridles shall be kept clear so as to permit unobstructed passage for employees using the gangway.

31. When the upper end of the means of access rests on or is flush with the top of the bulwark substantial steps, properly secured and equipped with at least one substantial hand rail approximately 33 inches in height, shall be provided between the top of the bulwark and the deck.

32. Obstructions shall not be laid on or across the gangway.

33. The means of access shall be adequately illuminated for its full length.

34. Unless the construction of the vessel makes it impossible, the means of access shall be so located that drafts of cargo do not pass over it. In any event loads shall not be passed over the means of access while employees are on it.

35. The vessel shall provide at least one safe and accessible ladder for each gang working in a hatch.

36. Vessels entering port shall be sure that all decks and other places where persons are engaged in the operations shall be free from litter, reasonably clean, and passageways open.

37. Grease, oils, etc., spilled where operations are being carried on shall be immediately covered by sand or other suitable material.

38. A liberal supply of sand or other suitable material shall be kept readily available for use on slippery places.

39. When ladder rungs are broken or missing or ship's ladders are otherwise unsafe, they shall be blocked off pending repair. Pending repair, portable rungs, when available, shall be installed or portable straight ladders, properly secured, shall be provided. Where it is not practical to use straight ladders, properly secured Jacob's ladders may be used, provided they are of the double rung or flat tread type. Where a Jacob's ladder is used, it shall not exceed the height of one deck. However, in no case shall the height exceed 20 feet.

40. Hold ladders shall be kept clear and no cargo stowed within six inches (6″) from back of ladder rungs.

41. Where necessary to ensure a safe operation, steam winches controlled by a horizontal lever shall have the lever counterbalanced by a properly secured weight.

42. Where extensions to operating levers of winches are used, they shall be furnished by the employer or vessel and be constructed of material of sufficient strength, and securely attached to the regular levers.

43. The winch fall shall be so wound on the drum so that the lever is operated in the same directions as the load, if the design of the winch permits.

44. When employees are required to work in the bight formed by the heel block, a preventer of at least ¾ inch diameter wire rope, rove reasonably snug and adequately secured, shall be rigged, or equally effective means shall be taken to hold the block and fall in the event that the heel block attachments should fail. Where physical limitations prohibit the fitting of a wire rope preventer of the required size or of other equally effective means, the maximum possible protection shall be provided.

45. If the heel block is not so rigged as to prevent its falling when not under strain, it shall be secured to prevent alternate raising and dropping of the block. This requirement shall not apply when the heel block is so located as to be at least 10 feet above the deck when at its lowest point.

46. Measures shall be taken to prevent escaping steam from obscuring any part of the decks, gangways, stages, wharfs, or other places, or from otherwise hindering or injuring any person employed in the operation.

47. In order to furnish a clear space for handling hatch covers and strongbacks during covering and uncovering operations, and the entire hatch is to be opened at following ports, cargo in 'tween decks shall be so stowed as to provide a clear space of thirty-six (36″) around the hatch coaming. Such clearance should be designated by appropriate marking.

48. When deck loads are stowed closer than three feet (3 ft.) to a hatch coaming, life lines shall be rigged for the safety of men handling strongbacks and hatch covers on main decks.

49. Where cargo is stowed on a section of a hatch, a space of thirty-six inches (36″) shall be left for the safe handling of individual hatch covers from the adjoining section. In the application of this rule and the foregoing rules dealing with thirty-six inches (36″) of clearance (in stowage of cargo) around hatch openings, deck openings, and manholes which are flush with the deck shall be protected by use of either covers or railings.

50. Hinged manhole covers shall be provided with positive locking devices to hold them in an open position.

51. Bridles shall be long enough to reach easily the holes, rings, or other lifting attachments on the beams and pontoons. The bridles shall be of adequate strength and properly maintained, including covering or blunting of protruding ends in wire rope splices.

52. Bridles for lifting hatch beams shall be equipped with toggles, shackles, or hooks, or other devices of such design that they cannot become accidentally dislodged from the beams with which they are used. Hooks other than those herein described may be used only when they are hooked into the standing part of the bridle. Toggles, when used, shall be at least one inch longer than twice the longest diameter of the holes into which they are placed.

53. Bridles used for lifting pontoons and plugs shall have the number of legs required by the design of the pontoon or plug, and all legs shall be used. Where any use of a bridle requires fewer than the number of legs provided, idle legs shall be hung on the hook or ring, or otherwise prevented from swinging free.

54. At least two legs of all strongback and pontoon bridles shall be equipped with a substantial fiber rope lanyard at least 8 feet long and in good condition. The bridle end of the lanyard may be of chain or wire.

55. When preventers are used they shall be of sufficient strength for the intended purpose and secured to the head of the boom independent of working guys except when, in the case of cast fittings, the strength of the fitting exceeds the total strength of all lines secured to it. Any tails, fittings, or other means of making the preventers fast on deck, shall provide strength equal to that of the preventer itself.

56. When used, chain topping lift stoppers shall be in good condition, equipped with manila tails, and of a length to allow not fewer than three half-hitches in the chain.

57. When used, chain stoppers shall be shackled or otherwise secured in such a manner that their links are not bent by being passed around fittings. The point of attachment shall be of sufficient strength and so located that the stoppers are reasonably in line with the normal topping lift lead at the time the stopper is applied.

58. When used, patent stoppers of the clamp type shall be suited to the size of the rope used. Clamps shall be in good condition and free of paint, grease and dirt which would prevent their being drawn tight.

59. Cargo booms shall have the approved capacity as a swinging boom plainly marked in a conspicuous manner and place, preferably at the heel of the boom.

60. Broken, split, or ill-fitting hatch covers shall be replaced at once.

61. All hatch covers, and fore and aft and 'thwartship beams, in so far as they are not interchangeable, shall be clearly marked to indicate the

deck and hatch to which they belong and their position therein.

62. All lumber used for staging, scaffolding, walkways and ladders aboard ship shall be of sufficient quality to meet or exceed the purpose for which it is used.

63. If a ship, boat or other vessel is alongside any other ship, boat or other vessel, and persons employed are required to pass from one to the other, a safe means of access shall be provided.

64. All locking devices on beams, pontoons, or mechanical hatch covers shall be maintained in safe working condition.

65. Removal of strongbacks or beams that are jammed in position shall be the responsibility of the vessel. This also applies to mechanical hatch covers where similar conditions exist.

66. Measures shall be taken during cargo operations to prevent the vessel from listing excessively.

67. Vessels arriving in port with deck cargoes shall provide, where necessary, safe and adequate walkways.

PART D
DUTIES OF EMPLOYERS

1. The employer shall:
   - A. Provide and maintain, so far as the same shall be under his control, a safe working place for all operations.
   - B. Provide for the proper and safe condition of all stevedoring gear supplied by him.
   - C. Require the use of safe operating methods and practices.
   - D. See that all working areas as well as regular passageways to a wharf, pier, terminal, or vessel are safely and sufficiently lighted.

Order and Judgment of the Court of Appeals

COURT OF APPEALS
STATE OF NEW YORK

The HON. SOL WACHTLER, *Chief Judge*, Presiding

No. 675

OTTAVIA BUSSANICH ET AL.,

Appellants,

—v.—

UNITED STATES LINES, INC.,

Respondent.

The appellant(s) in the above entitled appeal appeared by Fred R. Profeta, Jr., Esq. the respondent(s) appeared by Kirlin, Campbell & Keating, Esqs.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Appellants' oral application to strike matter from respondent's brief denied. Opinion Per Curiam. Chief Judge Wachtler and Judges Meyer, Simons, Kaye, Alexander and Titone concur. Judge Hancock took no part.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ DONALD M. SHERAW
Donald M. Sheraw,
Clerk of the Court

Court of Appeals, Clerk's Office,
Albany, January 14, 1986

No. 85-1686

(2)

Supreme Court, U.S.
FILED
MAY 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

OTTAVIO BUSSANICH and ANTONIA BUSSANICH,

Petitioners,

vs.

UNITED STATES LINES, INC.,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF IN OPPOSITION

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34PP

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does this case warrant the sparing exercise of this Court's extraordinary certiorari jurisdiction where the result below is fully supported by the caselaw and evidence presented at trial?

2. Was the text as well as the substance of the Joint Maritime Safety Code in evidence for the jury's deliberations, inasmuch as the jury was never told that the code was stricken from evidence? Does this render the error, if any, harmless?

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

United States Lines, Inc. is a wholly-owned subsidiary of McLean Securities, Inc. The latter is traded publicly on the New York Stock Exchange and approximately 90% of its shares is owned by Malcolm P. McLean.

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APPENDIX

Appendix A—Portions of Trial Court's Charge Relevant to Negligence 1a

No. 85-1686

In The

Supreme Court of the United States

October Term, 1985

OTTAVIO BUSSANICH and ANTONIA BUSSANICH,

Petitioners,

vs.

UNITED STATES LINES, INC.,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner's characterization of the proceedings below is woefully inadequate, and carefully engineered to deceive this Court into assuming jurisdiction over an otherwise insignificant negligence case. Respondent herein adopts the factual findings of the opinion below (Petitioners' Appendix pp. 3a-5a), with the following clarifications:

This is the fifth judicial review demanded by the petitioner of the propriety of the jury's verdict, which concluded after more than 5 weeks of trial. Petitioners understandably limit their petition for certiorari to the issue of whether the Joint Maritime Safety Code of the Port of New York (herein the Code) when taken as a whole might be relevant to a shipowner's duties. Such an issue may indeed give rise to some academic legal argument concerning *dicta* in *Scindia Steam Navigation Corp. v. DeLos Santos*, 451 U.S. 156 (1981). It is not, however, the *real* issue in this case.

Throughout the appellate proceedings, petitioners have consistently ignored the real basis for their defeat at trial: *credibility*. Furthermore, in seeking review below by the New York Court of Appeals, petitioners made what should be the fatal blow to their credibility. Petitioners tendered to that court an intentionally altered trial transcript in an outrageous attempt to convince that court that the deliberating jury was interested in reviewing the Code.[1] We now enter the twelfth year of litigating an injury case wherein the petitioner Ottavio Bussanich was disabled for 33 days. We respectfully request that this Court put an end to petitioners' litigational harassment of the respondent by closing this "era" with a denial of the writ.

---

1. Respondent brought this to the lower court's attention in its brief on the merits, Point I. Petitioners moved to strike Point I of Respondent's Brief and Respondent's Appendix (which contained a true copy of the transcript) at oral argument. Petitioners' motion was denied. (*See* Petition, Appendix p. 12a.) Respondent intends to notify the appropriate disciplinary authority at the conclusion of this matter.

REASONS FOR DENYING THE WRIT

I.

THE RECORD BELOW FULLY SUPPORTS THE RESULT REACHED BY THE NEW YORK COURT OF APPEALS.

Although not specifically discussed in the opinion below, the following arguments were briefed by the respondent and are offered here in support of the judgment. [*See Dayton Board of Education v. Brinkman,* 433 U.S. 406, 419 (1977).]

A. The clear factual basis for the jury's verdict denies ripeness to the legal questions presented by the petitioners.

Petitioners "tease" this court with a legal issue presented *in vacuuo*. Petitioners would have this Court believe, that but for the exclusion of the Code from evidence, the petitioners would have prevailed at trial.[2] But an examination of the evidence presented to the jury will disclose that the legal question presented in the petition was of no consequence in the trial result. The real reason respondent prevailed at trial was the incredible testimony petitioners presented to the jury in support of their version of how Ottavio Bussanich was injured.

Perhaps the only "fact" presented at trial upon which both sides agreed was that Mr. Bussanich was hit by a piece of falling wood and that he was wearing a hard hat. Petitioners' trial attorney, Mr. Kenneth Heller, argued that the wood had been part of the vessel's ammunition sheathing. He claimed that the

---

2. As discussed at page 13, *infra,* the jury was never told that the Code had been stricken, and the petitioners were allowed to make unilateral use of the Code.

respondent was negligent because it allowed a piece of ammunition sheathing to hang like a sword of Damocles over the head of longshoremen who worked under it. To support that claim, Mr. Heller relied on his interpretation of the vessel's log book, and the testimony of Mr. Bozo Mircovich, a workmate of Mr. Bussanich.

Respondent argued that the wood fell from a cargo bulkhead fence which was being dismantled or knocked down by Bussanich's employer, Universal Maritime Service Corp. A cargo bulkhead fence is a temporary wooden structure used to separate cargo. Once the cargo is removed, as it was at Bayonne, the stevedore knocks the fence down because it has already served its purpose (1363, 1367-1368).[3]

While Universal (the stevedore) was removing the bulkhead cargo fence, a piece of the fence fell off and hit Bussanich. To support its defense, respondent relied upon the vessel's log book, the stevedore's accident reports, and the testimony of Joseph Mickey, Captain Flink and Captain Wheeler. One of the three accident reports (Exh. X) *contains a statement from Mr. Bussanich corroborating respondent's fence theory.* We quote from Exhibit X:

> "Claimant alleges: We were removing dunnage from lower hold. Thier (sic) was a fence holding cargo. I bent down to pick up piece of dunnage when 2 X 10 about 10 feet high fell off fence hitting me on top of head knocking my hard had off".

Quite obviously, if the jury believed this evidence it could quite easily reject Mr. Heller's theory of the case.

---

3. Numbers in parentheses with nothing more refer to pages in the appendix filed by the petitioner with the New York Court of Appeals.

Mr. Bussanich could not corroborate his attorney's sheathing theory. Indeed, his version, which was recorded on October 24, 1974 (*see* Exh. X), one day after the accident, totally undermined Attorney Heller's view of the case. At trial, some six years later, Mr. Bussanich testified that "something hit me", but he did not know *what* hit him (783). Mr. Heller had to look elsewhere to support his theory. He tried (and petitioners are still trying) to use respondent's log book (Exh. 10). But *if quoted accurately*, the log book does not corroborate the sheathing theory either. The log book merely confirms that the wood fell from a "bulkhead", and there was evidence that the terms bulkhead and fence can be used interchangeably (1483).

That being so, and because the stevedore's accident reports (including Mr. Bussanich's admission) specifically identified the wood as coming from a cargo fence (Exhs. W, X and Z), Attorney Heller's sheathing theory was in trouble. To get the case before the jury, Mr. Heller relied exclusively upon the testimony of Mr. Bozo Mircovich. It was the *sole source of support* for the sheathing theory. But the reliance was misplaced. Bozo's testimony defied common sense, the laws of gravity, and was specifically rejected by petitioners' own experts. He testified that a ten to fifteen foot length of 2 x 10 lumber which had been part of the ammunition sheathing fell from a wall and struck Mr. Bussanich (233-235). Prior to falling, the plank had been secured to the wall by a *single* eight-penny, common nail (238; *see also,* Pltfs' Exh. 6, a sample of the supposed nail). There were, said Bozo, no other nails and no other nail holes in the plank (240).

To place the inherent incredibility of that testimony in its proper focus, a description of the sheathing is necessary. Wooden ammunition sheathing is used to create a buffer between the ammunition and the metal skin of a ship. Its function is to prevent a spark from igniting the explosives. Petitioners' Captain Ash so testified (46-47). The consequences of an improper installation

could be drastic. The ship could explode. Lives could be lost. Millions of dollars could be wasted. All for the want of about 8 or 10 nails. Nonetheless, to believe Bozo, one would have to believe that the professional carpenters who installed the sheathing at Sunny Point, North Carolina were content to affix the plank with but a single nail.

Petitioners' own nail and carpentry experts both testified that Bozo's description of the accident was not possible and/or laughable.

However, Bozo's "one nail" testimony did "fit" respondent's cargo bulkhead fence theory. That's because there are no specifications for erecting a cargo fence (1397-1399). Such a fence is a rough temporary structure which is built to separate cargo, and which must be and was torn down by the longshoremen after the cargo has been discharged (1363, 1367-1368).

Another example of the incredible testimony offered by the petitioner is Bozo's testimony in his description of how Mr. Bussanich exited the hatch. To support his allegations of accident-related brain damage, and to get around his client's senility (1753) Attorney Heller needed some evidence of unconsciousness. He had to "hurdle" the log book and the Bayonne Hospital records (Exh. D), both of which contraindicated his allegations of unconsciousness.[4]

Bozo Mircovich testified that Mr. Bussanich had to be removed from the hatch. "He was in a daze, he couldn't stand up" (231). How then did Mr. Bussanich get out of the hatch?

---

4. The log book states that petitioner "walked ashore". The hospital records state "on 10/23/74 struck by 2 x 10 ft. piece of wood. Not unconscious, but dazed."

Was the stevedore's procedure for removing injured longshoremen followed? (*See* pages 1386-1388.) Was a Stokes Basket used? No! Two fellow longshoremen grabbed Mr. Bussanich's collar and pushed and pulled him up a very long, absolutely *vertical* ladder[5] (231-233).

It is upon this incredible background of testimony that petitioners seek this court's careful and time consuming review of a tangential legal question, which, as will be developed below, was properly decided at each level of review.

B. Petitioners were not prejudiced by the trial court's ruling on the Joint Maritime Safety Code.

The alleged "error" committed by the trial court below was not only harmless (assuming *arguendo* that it was error) but favorable to the petitioner.

At trial, Part C(1) of the Joint Maritime Safety Code[6] had been admitted into evidence during Mr. Heller's direct examination of the petitioner's expert Captain Ash. Before offering it, Captain Ash had testified that the Code is a codification of the custom and practice in the maritime industry (96-97). Respondent did not object (98), and the section was read to the jury (99-100). This section reads:

> "The owner, master and officers of the vessel shall supply and maintain in a safe condition for use all ship's gear, equipment, tools and work spaces which are to be used in stevedoring operations."

---

5. See Respondent's Exhibit FF, a representative photograph of the ladder in question (1443-1444).

6. Respondent's Exhibit 3.

Mr. Heller then made use of this Code section by asking Captain Ash to opine whether respondent had complied with same by providing petitioner with a safe place to work. Of course, Captain Ash replied that respondent had not done so (134-135). Mr. Heller continued to make use of the Code section during his deposition of Captain Kjeldsen (321-322), and during his cross examination of Captain Flink (1500).

During its case, respondent sought to "offset" petitioner's offer of the above cited Code section by having the court take judicial notice of (1631-1633) and charge[7] other sections of the same Code. These sections were favorable to respondent's position because they place the control of longshore operations exclusively in the domain of the stevedore, and they impress the stevedore with a duty to report accidents. In essence the following sections overwhelmed petitioners' Part C(1).

Those sections read:

> "B(2). The pertinent facts of accident occurrence shall be recorded on a suitable form for purposes of analysis and prevention.
>
> C(24). Ship's crewmembers shall not be permitted in the immediate vicinity of longshore operations except in the course of their duties, but in no event while under the influence of intoxicating liquor.
>
> F(2). At the start of operations, supervisors shall conduct a visual examination of all gear and operating conditions. They shall see that operations are carried on in a safe manner. Where there is

---

7. See Respondent's Request to Charge #48.

an immediate danger to the health or safety of men, they shall stop the work, if necessary, to avoid accidents.

F(3). Supervisors shall:

(b) Report any defect in the gear or machinery, or unsafe condition and promptly obtain corrections, before proceeding with work;

(d) Recognize, avoid and discourage, careless or reckless work practices or actions which are likely to result in injury to themselves or fellow workers;

(f) Make every effort to determine cargo hazards in advance, and to have correct personal protection at hand for known hazards.

G. Hatch Bosses shall:

(b) Order work stopped temporarily in his hatch to prevent personal injury where conditions in his judgment so warrant;

(c) Immediately notify the head foreman, or assistant head foreman, of any unsafe conditions or practices;

(f) Maintain good housekeeping, for example proper placement of hatch boards, beams, topping lifts, dunnage, hatch tarpaulins, guys, etc.

> J(1) Employees shall be thoroughly familiar with this Code paying particular attention to all safety devices and equipment required and provided for their own protection.
>
> J(2) Employees reporting for work shall wear safety shoes, work gloves and an approved type hard hat. In addition they shall wear any protective equipment which may be provided for a specific job or condition.
>
> J(4) All personnel shall refrain from careless or reckless actions that could result in an accident or injury to themselves or fellow workers. This includes all forms of horseplay."

The court agreed to take judicial notice of the above Code sections (1632), and respondent later requested a charge based on these sections. However, during the pre-charge conference, the court not only denied respondent's Request #48, but then ruled that the Code would be stricken from evidence.

During that conference, both sides contended that the Code codified the custom and practice (1925-1926). Respondent also argued that it would be prejudiced by a refusal to grant Request #48 because petitioners had already been allowed to use, *and had already read to the jury,* that portion of the Code which was favorable to their case (1927-1932).[8] However, the Court's ruling stood, and respondent's Request #48 was denied.

At that point, petitioners "had their cake and ate it, too". Mr. Heller reacted by "backing off" his earlier position in these words:

---

8. Respondent was never allowed to have the jury hear the above-quoted Code sections that it had offered.

> "I agree its a codification on custom and practice, and whatever Your Honor chooses to do, I'll pass on. I'll defer to Your Honor". (1928)

However, his deference was short-lived. The court's decision did not stop at denying respondent's requested charge. It also included a ruling that the entire Code was going to be stricken, and that the jury would be instructed to disregard it. At that point, Mr. Heller voiced an exception (1931-1932).

The striking of C(1) along with the *proposed* jury instruction to disregard C(1) would have denied petitioners the unfair advantage of an ex parte use of the Code. *But a review of the charge reveals that Mr. Heller's advantage was never lost because the jury was never instructed to disregard the Code.* The claimed error was obviously harmless to petitioner; it was an error in his favor.

The harmlessness of the so-called "error" continues to run even more deeply. Captain Ash testified for petitioner that the Code was a codification of the custom and practice in the maritime industry (96-97).

Against this backdrop *and without informing the jury of its ruling that the Code had been stricken,* the jury was instructed that:

> "Evidence of the general custom and usage by others engaged in the same trade or business of the Defendant was received in evidence as bearing upon the reasonableness of the Defendant's conduct under the circumstances . . .
>
> A General custom or practice in the particular trade or business, if proved to your satisfaction, may establish a standard of reasonable conduct

> in such trade or business. It is for you to determine whether or not the evidence in this case does establish a general custom or usage in the trade or business.
>
> *If you find it does, you may consider it in connection with your appraisal of the care exercised by the Defendant in this case,* but it is not [the] conclusive or controlling test of due care." (2159-2160) (Emphasis supplied.)

The jury was also instructed on the respondent's duty to provide petitioner with a safe place to work, and a reasonably safe ship.

Hence, the above-cited instructions gave the jury the invitation by the court to find the respondent negligent if the jury believed that U.S. Lines had not lived up to the industry's standards. Subsection C(1) of the Code was substantially the same as petitioner's 7th and 8th Requests to Charge which were granted (1798) and charged. It is well to recall at this point that a judge is not obligated to adopt the exact language of counsel when preparing the charge. *See Ayers v. Watson,* 137 U.S. 584, 601 (1890); *Lukasiewicz v. City of Buffalo,* 55 A.D. 2d 848 (1976).

C. The Code does not impose a duty that is any different from the caselaw as charged. It is reconcilable with all cited cases.

Part C, Section 1 of the Code reads as follows:

> "The owner, master and officers of the vessel shall supply and maintain in safe condition for use all ship's gear, equipment, tools and work spaces which are *to be* used in stevedoring operations." (2228) (Emphasis added.)

The words "to be" obviously contemplate that which will take place at a future time, viz., the commencement of stevedoring operations. Petitioners' own expert, Captain Ash, conceded as much, in the following testimony:

> "Q. Now for example a ship like the Pioneer Contender, *prior to its arrival* in the Port of New York For the purpose of either loading or discharging cargo, are there certain customs and practices that the ship's officers follow with regard to inspection of the ship's cargo holds?
>
> A. Yes.
>
> Q. And what are those customs and practices?
>
> A. They have to see to it that the vessel is in all respects ready to load cargo *on arrival*; that is, as to cleanliness, sanitary conditions, seaworthy condition, and its fixtures properly in place . . ." (Emphasis added.) (61).

Before turning over the work area, the Code requires the shipowner to exercise reasonable care to ascertain that its gear, equipment, tools and work spaces are reasonably safe for the stevedore's use. The Code *does not say* that the shipowner shall supply and maintain in safe condition for use all ship's gear, equipment, tools and work spaces while they continue *in use during stevedoring operations.*

The law is clear that the shipowner does not have "a continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the loading or unloading process." [Quote from *Scindia Steam Navigation Co. v. De Los Santos, supra*, 451 U.S. 156, 169 (1981)]. Consequently, absent

notice that a danger has arisen *after* the commencement of the stevedoring operations, neither the Code nor the caselaw support petitioners' contention that the shipowner must continue to "check up" to make sure that the work area remains safe.

At trial there was no evidence (indeed there was and is no claim) that the shipowner was on notice that its work area had become unsafe after the commencement of the stevedoring operations. Petitioners' entire case was aimed at proving that respondent somehow breached its pre-discharge duty of providing Bussanich with a reasonably safe place to work.

The only issue petitioners tried to send to the jury was whether the respondent fulfilled its duty of starting off Bussanich and his co-workers with a reasonably safe place to work. Respondent never denied that it had such a duty (2490-2194). The duty was charged to the jury at length (2151-2152, 2153, 2156-2159).

A charge on the Code would have been superfluous. Part C, Section 1 of the Code expresses the exact same concept which was expressed in the charge. The jury was invited to find for the petitioner if it found that:

> "the Defendant failed to properly inspect the ammunition bulkhead or sheathing prior to plaintiff's accident;" (2158).

The jury was also instructed that:

> "[t]he owner has a duty to see that such people as Plaintiff, while on board the ship, are not exposed to unnecessary risk, and to provide them with safety, and he is liable for negligence for his failure to take reasonable precautions for the safety of workers." (2157-2158).

Petitioners rely on *Irizzary v. Compania Maritima Navegacion Neutmar, S.A.*, 1981 AMC 2424 (2nd Cir. 1980), *cert. denied,* 451 U.S. 969 (1981), in support of their claim that the Code imposes a continuing duty to assure the safety of work spaces for longshoremen. They also rely on *Scindia, supra*. Their reliance is misplaced.

In *Irizzary* (a case which petitioners cite despite the Second Circuit's instructions to the contrary (*see* the footnote at p. 2425 of the opinion), a longshoremen was injured while walking across the icy top of a container. There was evidence that the ice and slush had accumulated *before* the ship reached port and *before* the stevedore had begun to work. *There was also evidence that the shipowner had actual knowledge of the ice and slush*, and of the fact that the plaintiff's job required him to walk across the top of the container. Thus the danger pre-existed the commencement of the stevedoring operations. The shipowner was held liable because the jury found that it breached its duty of supplying the stevedore with a reasonably safe place to work.

On appeal, the shipowner argued that because 29 C.F.R. 1918.94(c) impresses the stevedore with the duty of eliminating slippery conditions as they occur, and because the ice and slush were a patent or obvious danger, the shipowner should be exonerated *as a matter of law*. The Second Circuit rejected that argument because (a) a shipowner has a duty to provide a reasonably safe place to work; and (b) once a factfinder decides that said duty has been breached, a shipowner cannot escape liability because the stevedore was also negligent. Stated differently, *Irizzary* stands for the proposition that if a shipowner decides to shift a patent, pre-existing danger upon the stevedore, the shipowner runs the risk of being held liable if the factfinder concludes that the shipowner should have anticipated the harm despite the stevedore's concurrent knowledge of the danger.

Contrary to petitioner's contention, the fact that the *Irizzary* court makes reference to the Code section in issue cannot be taken to mean that the court interprets the Code as burdening the shipowner with a so-called continuing duty. Liability had been premised on the shipowner's breach of its *pre-discharge duty* to remove the ice and slush from an area which was going *to be* used by the stevedore.

The Joint Maritime Safety Code is reconcilable with the charge and, as discussed below, with *Scindia*, in another way. The Code provides that the shipowner "shall supply and maintain . . ." The cases *do* require the vessel to maintain a safe area when it is notified that the area has become unsafe in a way that a shipowner is expected to correct. Stated a bit differently, "maintain" does not mean to *assure* against mishaps as "unseaworthiness" did before Congress eliminated the unseaworthiness cause of action in 1972.

If "maintain" means to correct a condition which is in the ship's domain once it is told it needs correcting, then Part C-1 of the Code is perfectly reconcilable with the judge's charge in this case. To argue otherwise would be to allow petitioners to resurrect the liability-without-fault doctrine of unseaworthiness, which Congress and the courts have rejected. *See* the legislative history to the 1972 Longshore Act. H.R. Rep. No. 92 - 1441, 92d Cong., 2d Session, reprinted in (1972) U.S. Code Cong. & Ad. News 4705.

Petitioners cite *Scindia* for the proposition that the Supreme Court interpreted Part C, Section 1 of the Code to mean that shipowners have agreed to take on a duty which the law does not require, viz., a duty to discover and correct dangerous conditions that develop during the loading or unloading process. Indeed, petitioner's counsel now asserts that the vessel has a duty to send an officer to the edge of the hatch to look down upon

the longshoremen working in the hold and supervise their work! (Petition at p. 19)

Most significantly, the Supreme Court's reference to the Code is found in that portion of the opinion (the portion set forth under Roman numeral IV) which begins with the following sentences:

> "We arrive at the more difficult and recurring issue involved in this case: What are the shipowner's duties *when he learns* that an apparently dangerous condition exists or has developed in the cargo operations, which is known to the stevedore and which may cause injury to the longshoreman? Must the owner take some action?" (Emphasis supplied.) *Scindia, supra,* p. 172-173.

Thus, those questions are answered under the assumption that the shipowner *has learned* of the danger. As discussed above, the shipowner can only be held liable on constructive notice if the defect existed at the outset. That is because a shipowner has a duty with respect to the condition of the ship's gear, equipment, tools and work spaces *to be* used in the stevedoring operations.

What happens when a shipowner gets actual notice of a post-outset defect? Can a shipowner completely divorce himself from the stevedore's work and ignore a post-outset danger simply because the shipowner had *no duty* to learn of it? Those are the issues which are discussed in Section IV of the *Scindia* opinion, and it is in that section where the Court makes reference to the Code. Thus, *when read in context*, the Supreme Court's reference to *Irizzary* and to the Code cannot be taken to mean that the Supreme Court views the Code as imposing on the shipowner a continuing duty to inspect. Instead, the Court's Codal reference is only relevant to two categories of cases: those cases where a

shipowner has shifted a pre-existing danger upon the stevedore, or those cases where the shipowner has actual notice of a post-outset danger. Petitioners have never argued that respondent had actual notice of a post-outset danger, and thus only the first category is applicable.

As to the cases falling within the first category, the Code "mirrors" the Supreme Court's enunciation of a shipowner's pre-outset duty. The Code says:

> "The owner, master and officers of the vessel shall supply and maintain in safe condition for use all ship's gear, equipment, tools and work spaces which are to be used in stevedoring operations."

The Supreme Court said at p. 467:

> "The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools and work spaces to be used in stevedoring operations."

And the Bussanich's charge, incorporating petitioner's theory of the case to the law, reads:

> "You must determine, as the jury, on the basis of the evidence, presented at this trial, whether the ammunition bulkhead or sheathing was or was not properly secured to the hold of the vessel, and whether the Defendant had a reasonable opportunity to inspect the ammunition bulkhead or sheathing prior to the Plaintiff's accident, but failed to do so, and whether such failure was a proximate cause of Plaintiff's accident and resulting injuries.

> If you find that the defendant failed to properly inspect the anmmunition bulkhead or sheathing prior to plaintiff's accident, you may find negligence on the part of the defendant." (2158-2159).

All three enunciations are perfectly consistent.

D. Petitioners' codal argument is overbroad.

As demonstrated by Petitioners' Brief opposing counsel has searched the four corners of the 55 page Joint Maritime Safety Code in a desperate attempt to find some clause or phrase which might somehow be relevant to the facts of this case. The search was futile, and petitioners must confine their codal arguments to their erroneous interpretation of Part C, Section 1 of the Code. Petitioners do not and cannot argue that other codal provisions are relevant to *the facts of this* Bussanich case. They instead cite various codal provisions having to do with lighting, ladders, heel blocks and hatch covers. (*See* Petition at pages 14-16.) While those provisions might be relevant to cases involving lighting, ladders, heel blocks and hatch covers, they are of no relevance here, and petitioners seek to bootstrap their codal arguments by asking this Honorable Court to review the entire Code despite the fact that C(1) was the only Code section which petitioners offered at trial and that C(1) was the only Code section which petitioners offered to the New York appellate courts.

As demonstrated above, the jury's instructions included a charge mirroring the language of C(1). Indeed C(1) was read to the jury, and the jury was never told to disregard it. The practical effect of all of this is that petitioners now seek a decision on issues which cannot have any effect upon the outcome of this case. On that score, it is to be noted that the New York Court of Appeals limited its discussion to C(1).

II.

THE CHARGE WAS PROPER IN ALL RESPECTS.

The challenged instruction reads as follows:

> "[O]nce an independent stevedoring contractor such as petitioner's employer has started the cargo handling operation, it becomes the stevedore's duty, not the vessel owner's, to take such steps as are necessary to maintain a safe place in which the stevedore's employees can work" (2193).

Despite the assertion that this charge constituted error, it is gratifying to note how well it fits the Supreme Court's standard which was enunciated in *Scindia*.

As stated in *Lemon v. Bank Lines*, 656 F. 2d 110, 115 (5th Cir. 1984), The *Scindia*

> "Court recognized that it was the stevedore, and not the shipowner who was the longshoreman's employer and therefore responsible for maintaining safe working conditions during cargo operations pursuant to 33 U.S.C. § 941. Hence, it was the stevedore who bore the burden of discovering any hazard created during the stevedoring operations."

While ruling upon the Requests to Charge, the following admonition was administered to Mr. Heller:

> "THE COURT: Look, you have an idea that you only charge your view of the evidence.

> MR. HELLER: I am prejudice, Your Honor. You know that, but . . .
>
> THE COURT: But it isn't our duty to adopt any one point of view of the evidence. Our duty is to give them a charge that if they find the evidence, witnesses within that, that they go that route. If they don't find it, they don't do that." (1912).

Petitioners continue to ignore the above-cited admonition. Once again, petitioners refuse to recognize respondent's cargo fence theory. Petitioners *assume* that the jury could not help but believe Bozo's incredible testimony, and then argue that the challenged charge is erroneous because a stevedore would not have control over a vessel's ammunition sheathing. However, the court properly refused to adopt petitioners' theory of the case to the exclusion of respondent's theory.

Petitioners also *isolate* the challenged instruction and argue that it is erroneous and/or inconsistent. That technique violates a fundamental principle of appellate review, *i.e.* that jury instructions must be considered *as a whole*.

> "In the review of jury instructions, a challenged instruction should not be considered in isolation but rather as part of an integrated whole. If, viewed in that light, the jury instructions are comprehensive, balanced, fundamentally accurate, and not likely to confuse or mislead the jury, the charge will be deemed adequate." *Schieb v. Williams,* 628 F. 2d 509, 511 (5th Cir. 1980). *See also, Kalish v. Krieger*, 42 A.D. 2d 955 (1973), *aff'd,* 35 N.Y. 2d 864; *Franks v. U.S. Lines*, 324 F. 2d 126 (2nd Cir., 1963).

Petitioners argue as if the charge did not encompass their view of the case. But it did. Indeed, but for the so-called "supplemental charge", it would have done so to *the exclusion of respondent's theory*. (Relevant portions of the charge are reproduced in the Respondent's Appendix pp. 1a.)

As rendered before the recess, the charge contained many specific references to petitioners' ammunition sheathing theory, but was devoid of any specific reference to respondent's cargo fence theory.

After reading the main charge but before the jury retired, the judge held a robing room conference. At that time, respondent took exception to the absence of any reference to the fence theory. The judge agreed to mention the word "fence" (2189). Respondent also advised the judge that a portion of the initial charge that had already been granted at the pre-charge conferences (1900, 1901, 1903, 1904) had not been read to the jury. The court agreed to rectify the omission (2185), and then completed the main charge. In doing so, the word "fence" was finally mentioned (2194-2195) and the now challenged charge was given[9] (2193).

A reading of the *whole* charge reveals that petitioners have no basis in the record upon which to argue that their version of the case was not clearly and adequately presented to the jury. Petitioners requested and received a charge which invited the jury to "buy" the ammunition sheathing theory. Contrary to petitioners' allegations, the jury was *never* told that the shipowner's

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9. The charge in question is more accurately described as a *completion* of the main charge rather than a supplemental charge. It was delivered after a short robing room break in the proceedings and before the jury retired. It is respectfully submitted that the court would have committed error had it *not* continued and completed its charge. *See Carotenuto v. Surface Transportation, supra.* That is the very purpose of a robing room post-charge conference.

duty ceased once cargo operations began. Instead, the jury was told, and properly so, that the shipowner had to *provide* petitioner with a reasonably safe place to work, and that the stevedore had to *maintain* the work area during the cargo handling operation. The jury was not instructed that the stevedore had to remedy pre-existing hazards or *create* a safe work place. But it was told that the respondent could not be held liable if the *sole* cause of the accident was "an unsafe method or manner of unloading" *i.e.* stevedore's negligence (2160).

III.

THE DECISION BELOW DOES NOT "EMASCULATE" THE CODE.

As stated above, the only provision of the Code relied upon and argued by the petitioners below was Part C Section 1. Petitioners argued (and continue to argue) that this one sentence, selected from 55 pages of specific provisions, requires the shipowner to continually supervise and inspect all details of the stevedore's work. It was in response to that argument that the New York Court of Appeals held that the Code does not expand the duties imposed upon a shipowner pursuant to 33 U.S.C. Section 905(b).

Contrary to petitioners' arguments, the vitality of the Code is not premised upon its ability to expand the duties of a shipowner. The Code is a set of recommendations or guidelines to be used in stevedoring operations with the explicit purpose of avoiding accidents. Nowhere is it even implicitly stated in the Code that its provisions are intended to alter or expand the duties of the shipowner.

The Code is not a novelty. It is a list—a list of work practices generally agreed upon by the various entities involved in

stevedoring operations. The "duties", if any, contained therein are fully consonant with the general obligations imposed upon a shipowner under the negligence principles incorporated in 33 U.S.C. Section 905(b).

The opinion below does no more than state that the Code, by its language at Part C Section 1, does not expand the duties of a shipowner viz. 33 U.S.C. Section 905(b).

The New York Court of Appeals does not hold that the Code, in the proper case, should not be admitted into evidence. Thus in those cases involving fact patterns and/or instrumentalities specifically covered by the Code, its provisions may continue to be of value in acquainting the jury with the commonly agreed work practices of the industry.

CONCLUSION

For all the foregoing reasons it is respectfully submitted that the Petition should be denied.

Dated: May 16, 1986

Respectfully submitted,

DANIEL J. DOUGHERTY
KIRLIN, CAMPBELL &
KEATING
Attorneys for Respondent

APPENDIX A—PORTIONS OF TRIAL COURT'S CHARGE RELEVANT TO NEGLIGENCE

"Now, the Plaintiff, Ottavio Bussanich is suing the Defendant, United States Lines for money damage to compensate him for the personal injuries he sustained on October 23, 1974, at or about 2 p.m. while he was unloading cargo from the Defendant's vessel. *The Plaintiff claims he was struck on the head and neck by a large plank which was improperly secured or attached to the ammunition bulkhead or sheathing, as it is sometimes referred to, or has been during this trial.*

Plaintiff was employed by the Universal Terminal & Stevedoring Corporation as a longshoreman. *It is the Plaintiff's claim that the Defendant, United States Lines, was negligent in causing and allowing the bulkhead or sheathing to be constructed in an improper manner,* in failing to provide the Plaintiff with a safe place to work, in failing to discover and correct this dangerous condition. (2151-2152)

* * *

Now, I have just referred to the term negligence. What is negligence?

Negligence may be defined as the failure or omission to do some act or to perform some duty which one person owes to another. More simply defined, it is the absence of such care as a reasonably prudent person would be expected to use under the circumstances. Negligence is nothing more or less than carelessness. (2153)

* * *

I want to discuss with you the respective duties of the parties.

Appendix A

A ship owner, such as the Defendant, is subject to liability for injuries to longshoremen working on or near the vessel if, but only if, the ship owner knows of, or by the exercise of reasonable care would discover a dangerous condition existing on the vessel, and should realize that it involves an unreasonable risk of harm to such longshoremen, and, two, the ship owner fails to exercise reasonable care under the circumstances to protect the longshoremen against the danger.

A ship owner's liability for negligence is based upon the failure of the ship owner's officers or crew or ship's representatives to perform the duty of which a reasonably prudent officer, crew member or ship's representative should have done under the circumstances, that is, to provide a reasonably safe place for the Plaintiff to work, and to cause the remedy or removal of any dangerous or unsafe condition which it knows of, and in the exercise of reasonable care could discern or discover.

If you, the jury, find that the ship's officers, crew or representatives failed to exercise reasonable care and that failure to exercise such reasonable care was a proximate cause or contributed to the happening of the accident, you may render a verdict for the Plaintiff.

To repeat, a ship owner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew including a longshoreman such as the Plaintiff. The owner has a duty to see that such people as Plaintiff, while on board the ship, are not exposed to unnecessary risk, and to provide them with safety, and he is liable for negligence for his failure to take reasonable precautions for the safety of workers.

It is the duty of the ship owner to give notice and warning

Appendix A

s or defects in the ship, and appliances, and to avoid
langer. His duty is to provide a reasonably safe ship
vork on board. *You must determine, as the jury,*
of the evidence, presented at this trial, whether the
bulkhead or sheathing was or was not properly
hold of the vessel, and whether the Defendant had
opportunity to inspect the ammunition bulkhead or
or to the Plaintiff's accident, but failed to do so,
such failure was a proximate cause of Plaintiff's
resulting injuries.

nd that the Defendant failed to properly inspect the
bulkhead or sheathing prior to Plaintiff's accident,
l negligence on the part of the Defendant.

* * *

e stevedoring contractor who hired the Plaintiff in
harged with the duty of selecting the method of
perations to handle cargo, and if this accident was
by an unsafe method or manner of unloading the
ip owner may not be held liable.

of the stevedoring contractor who hired the Plaintiff
easonable supervision of the method or manner of
ected to be performed by their employers, and the
onably supervise the details of the stevedoring
(2160-2161) (Emphasis supplied)